THE

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JUDGES OF THE HIGH COURT OF CALCUTTA DURING 1900.

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Standing Counsel:

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I.L.R., 27 CALCUTTA.

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PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, and Sir Richard Couch.

[*On petition relating to an appeal from the High Court at Fort William in Bengal.*]

1899 JULY 8.

PRIVY COUNCIL.

27 C. 1 (P.C.) = 26 I.A. 281 = 4 C.W.N. 34 = 7 Sar. P.C.J. 567.

MOHESCHANDRA DHAL (*Plaintiff*) *v.* SATRUGHAN DHAL AND OTHERS (*Defendants*),
EX PARTE MOHESCHANDRA DHAL (*Petitioner*).
[6th May and 8th July, 1899.]

Privy Council, Practice of—Stay of Proceedings in India pending appeal—Protection of property pending an appeal by special leave—Order for stay of proceedings—Civil Procedure Code (Act XIV of 1882), chap. XLV.

Special leave of Her Majesty in Council was obtained for the filing an appeal from a decree of the High Court affirming the dismissal of the petitioner's suit. The High Court rejected his application as plaintiff (appellant) for an order staying execution and continuing the possession of a manager of the estate in litigation pending the result of the appeal. The rejection was grounded on the absence of authority for this purpose, the High Court being authorized, in their judgment, only to make such an order in regard to appeals admitted by themselves. On this petition that the High Court's decision might be reversed, or such order made as would protect the property to abide the ultimate disposal of the suit, their Lordships were of opinion that direct interference to continue the management or to appoint a Receiver was impracticable. But that, on the other hand, interference had, on occasion, been effected where, the appellant being in possession, an order for stay of proceedings had maintained the existing state of things. Therefore, an order staying proceedings should now [2] be recommended by them, the petitioner being answerable in damages, and any aggrieved respondent having leave to move for the discharge of the order.

[Rel., 7 Ind. Cas. 188 (189); 3 O.C. 243 (244) (B); R., 28 C. 171 (176); 38 C. 335 (P.C.) = 8 A.L.J. 449 = 13 Bom.L.R. 419 = 13 C.L.J. 529 = 11 Ind. Cas. 384 (385) = 10 M.L.T. 25; 10 C.L.J. 326 = 4 Ind. Cas. 452; 5 C.W.N. 781 (797).]

SPECIAL leave to appeal in the above suit had been obtained on the 18th July 1898 by the petitioner who had sued on the 10th October 1888

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alleging himself to be the heir of the late Ramchandra Dhal and claiming ancestral estate. The suit was dismissed on the 28th December 1891 by the Subordinate Judge of Chaibasa, in the Singhbum District, whose decree was affirmed on the 21st August 1896 by the High Court. The ground of dismissal was that the defendant, now first respondent, was the heir preferentially entitled.

The petitioner now asked for a stay of execution of that decree pending his appeal. The High Court had refused to admit an appeal to Her Majesty in Council under chap. XLV of the Code of Civil Procedure. The petition stated that the estate was, and had been since the last proprietor's death, in the possession of a manager under the Encumbered Estates Act. This manager had been appointed for the liquidation of debts which had been cleared off, leaving a balance now in his hands. It was further stated that the property yielded about Rs. 50,000 per annum, and that the first respondent was without means.

The petitioner, after obtaining the order of the 18th July 1898, had applied to the High Court with reference to cls. (*c*) and (*d*) of s. 608 of the Civil Procedure Code for a stay of execution, and an order that the manager should remain in possession until the final order of Her Majesty in Council or until the defendant should give security for the compliance with any order that might be made. This was refused by the High Court on the 3rd November 1898, on the ground that the exercise by them of such authority was not provided for in that section, or in any other part of chap. XLV of the Civil Procedure Code. The prayer of the petition included the asking for that order to be reversed, but reliance was placed at the hearing on the general authority to grant relief.

The application was made *ex parte*.

Mr. *J. D. Mayne* for the petitioner argued that as the [3] property in suit, now in possession of the manager as stated, was ready to be delivered to the person who should ultimately be held to be entitled, it was right that it should remain pending this appeal. This would be carried out if a stay of execution should be ordered. If the refusal of such a stay of proceedings by the High Court had been right on the ground that their authority in the matter was limited by what was provided in s. 608 of the Civil Procedure Code to appeals which had been certified and admitted in India, then it was a case for the relief which the Queen in Council could order. The exercise of this authority was within the intent and meaning of chap. XLV of the Code, as was shown by s. 616. That section declared that nothing in that chapter should bar the full and unqualified exercise of Her Majesty's authority in receiving and regulating appeals, and "otherwise howsoever." The reason for the stay of execution pending an appeal by special leave was quite as complete as in the case of an appeal which, according to the decision of the High Court, fell within their powers under s. 608. It might be argued that, with regard to s. 616, an appeal for which special leave had been granted thereupon, came within the scope of those powers. But if that were not so, such an order could be granted here. Reference was made to *Perladh Sein* v. *Bhoodoo Singh* (1), *Inder Kumari* v. *Jaipal Kumari* (2), *Rahimbhoy Habibhoy* v. *Turner* (3), and *Administrator-General of Bengal* v. *Premlall Mullick, In re Premlall Mullick's petition* (4).

(1) 10 M. I. A. 78.
(2) 14 C. 290=14 I. A. 1.
(3) 15 B. 155=18 I.A. 6.
(4) 22 C. 1011=22 I.A. 203.

JUDGMENT.

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27 C. 1 (P.C.) = 26 I.A. 281 = 4 C.W.N. 34 = 7 Sar. P.C.J. 567.

Afterwards, on the 8th July, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The object of this application is the protection of property pending an appeal. The petitioner is suing to establish his title to land as heir of one Ramchandra Dhal. His suit has been dismissed by the Subordinate Judge on the ground that Satrughan Dhal, a respondent, is the preferential heir and that decree has been affirmed by the High Court. Special [4] leave to appeal against the decree of the High Court was granted on the 18th July 1898.

The appellant now states that the estate of Ramchandra has been in the possession of a manager under the Encumbered Estates Act, and that the debts have been cleared off, and that a balance of Rs. 30,000 is in the manager's hands. He further states that Satrughan Dhal is a man of no means. He applied to the High Court to order that the manager should remain in possession, which they refused on the broad ground that the Code gives them no jurisdiction over the subject-matter pending an appeal not certified by themselves.

The petition asks the Queen in Council to reverse the order of the High Court, or to direct the High Court to deal with the case, or to give other relief.

Their Lordships cannot direct the High Court to act where they have no jurisdiction, and they are not prepared to differ from the High Court on the question whether or no they have jurisdiction, without hearing full argument on the point. They are at present disposed to agree that the jurisdiction does not exist; and though it may be very anomalous that property should be left without the possibility of interim protection pending an appeal granted by special leave, the case is one of great rarity, and not unlikely to have escaped the notice of the framers of the Code.

It is clearly quite impracticable, nor does the petition ask, that the Queen in Council should directly interfere to continue the manager, or to appoint a receiver. Interference has been effected here in cases where the Courts below had jurisdiction over the subject-matter, and an intimation to them would be effective; or where, the appellant being in possession, a stay of proceedings would keep the position of things intact. At the bar Mr. Mayne asked for a stay of proceedings in this case; and their Lordships are disposed to accede to his suggestion, because it is highly inconvenient that there should not be any interim protection at all pending such an appeal as this, and because, while such a stay of proceedings can hardly be productive of injury to absent parties, the petitioner's counsel is sanguine that it may afford the requisite protection.

[5] Their Lordships will humbly advise Her Majesty to grant an order staying proceedings, but the petitioner must be answerable in damages, and any aggrieved respondent must have leave to move for discharge of the order.

Solicitors for the petitioner: Messrs. *T. L. Wilson & Co.*

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APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

GERINDRA KUMAR DAS GUPTA AND OTHERS (*Petitioners*) *v.* RAJESWARI ROY (*Executor*).* [2nd August, 1899.]

Appeal—Order refusing to amend a clerical error in the form of Probate—Probate and Administration Act (V of 1881), *s.* 86—*Succession Act (X of* 1865), *s.* 263—*Exercise of power of High Court under s.* 622 *of the Civil Procedure Code.* 1882, *when there is no appeal.*

Where there was a clerical error in the form of probate granted, and the Judicial Commissioner refused to amend it on the ground that the probate was granted by his predecessor, it was held that though there was no appeal from such an order either under s. 86 of the Probate and Administration Act (V of 1881) or s. 263 of the Succession Act (X of 1865), yet the High Court might deal with the case under s. 622 of the Civil Procedure Code, and set aside the order. *Khettramoni Dasi* v. *Shyama Churn Kundu* (1) followed.

[R., 7 Ind. Cas. 710=70 P.R. 1910=123 P.L.R. 1910=94 P.W.R. 1910.]

THERE was an application for probate made to Mr. Cowley, the Judicial Commissioner of Chota Nagpur, and probate was granted on 18th June 1897. But, in issuing the probate, a printed form was made use of, according to which the probate purported to have been granted under s. 254 of Act X of 1865, as amended by ss. 8 and 9 of Act VI of 1881 and s. 4 of Act VI of 1889. The applicant, being a Hindu, did not apply for probate under these Acts or sections, which should have been struck out. Owing to this clerical [6] error, the applicant had some difficulty in administering the estate of the deceased, and he applied to amend the probate. Mr. Taylor, who had succeeded Mr. Cowley, refused to make the correction on the ground that he could not amend a probate issued by his predecessor.

From this order the applicant appealed to the High Court.

Babu *Jotindra Nath Banerjee*, and Babu *Samatul Chunder Dutt*, for the appellant.

No one for the respondent.

The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

JUDGMENT.

This is an appeal against an order of the Judicial Commissioner of Chota Nagpur, dated the 25th March 1898, refusing to amend a probate granted by his predecessor on the 18th June 1897.

It appears that the applicant to this Court applied for probate to the Judicial Commissioner of Chota Nagpur, on the 25th January 1897, and probate was granted accordingly. But, in issuing the probate, a printed form was made use of according to which the probate purports to have been granted under s. 254 of Act X of 1865, as amended by ss. 8 and 9 of Act VI of 1881 and s. 4 of Act VI of 1889. These words should apparently have been struck out from the probate, inasmuch as the applicant did not apply for probate under these Acts or sections.

The testator was a Hindu, and his application must be understood to have been made under s. 76 of Act V of 1881, as amended by s. 12 of

* Appeal from Order No. 207 of 1898, against the order of F. B. Taylor, Esq., Judicial Commissioner of Chota Nagpur, dated the 25th of March 1898.

(1) 21 C. 539.

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Act VI of 1889, and the Judicial Commissioner's order must be understood as having been passed under Act V of 1881. Owing, however, to a clerical error in the form of the probate, the applicant had some difficulty in administering the estate of the deceased; and he applied to the Judicial Commissioner of Chota Nagpur to amend the probate. The Judicial Commissioner, Mr. Cowley, having gone away, the application was made to his successor, Mr. Taylor, who refused to make the correction on the ground that he could not amend a probate issued by his predecessor. It is very doubtful whether there is any appeal in this case. We do not think that any appeal lies either under s. 263 [7] of the Succession Act or under s. 86 of the Probate and Administration Act. But we think we may deal with the case as an application under s. 622 of the Code of Civil Procedure. We find a precedent for this course in the case of *Khettramoni Dasi* v. *Shyama Churn Kundu* (1).

We, therefore, set aside the order of the Judicial Commissioner, and remand the case to him with a direction that he should amend the probate granted to the applicant by striking out the incorrect sections cited at the top of the probate.

We make no order as to costs.

M. R. M.

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27 C. 7.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Stevens.

MAULADAN (*Plaintiff*) v. RUGHUNANDAN PERSHAD SINGH (*Defendant*).*
[24th July, 1899.]

Transfer of Property Act (IV of 1882), s. 54—Vendor and purchaser—Deed of sale—Completion of sale—Registration—Non-payment of consideration—Delivery of deed of sale.

Mere registration of a deed of sale, unaccompanied by delivery of the deed to the vendee, does not make the transaction a completed one. Although under the Transfer of Property Act the sale of a tangible immoveable property of the value of one-hundred rupees and upwards can be made only by registered instrument, yet mere registration should not be taken as conclusive that the title has passed. If it was intended by the parties that the title should pass only upon the consideration money being paid, such intention should be given effect to.

Sheo Narain Singh v. *Darbari Mahton* (2) approved.

[**F.**, 3 Ind. Cas. 177; **Rel.**, 6 Ind. Cas. 477 (478); 19 Ind. Cas. 562 (563); **R.**, 28 M. 122 (124) = 14 M.L.J. 493; 4 C.L.J. 338; 15 C.L J. 61 = 16 C.W.N. 612 (615) = 13 Ind. Cas. 653 (655); 13 C.W.N. 692 = 4 Ind. Cas. 541; 21 T.L.R. 119 (124); 19 C. L.J. 146 = 17 C.W.N. 1161 = 20 Ind. Cas. 325; **D.**, 11 Ind. Cas. 24 = 10 M.L.T. 44 = (1911) 2 M.W.N. 376.]

THIS appeal arose out of a suit instituted by the plaintiff for a declaration that a certain deed of sale executed and registered by her in favour of the defendant was void and ineffectual on the ground that the consideration-money was not paid by the defendant within the time mentioned in a notice served on him. The deed of sale purported to convey to the defendant the shares of the plaintiff in certain mouzahs bearing [8] towzi Nos. 4664 and 4666, in the district of Darbhanga. The plaintiff alleged that

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* Appeal from Appellate Decree No. 82 of 1898, against the decree of Nilmani Dass, Subordinate Judge of Tirhoot, dated 23rd of August 1897, reversing the decree of Joya Prosad Pande, Munsif of Somastipur, dated the 30th of November 1896.

(1) 21 C. 539. (2) 2 C.W.N. 207.

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after the document was brought back from the Registration Office by her *am-mukhtear* the defendant on being asked for the payment of the consideration-money promised to pay it in a day or two and to take the document; but that eventually he declined to do so.

In defence, it was urged by the defendant that the suit for the cancellation of the deed was not maintainable, as his title to the properties under it was complete and absolute; and that he had paid almost the whole of the consideration-money with the exception of a small amount, about which he took a separate plea. The document remained in the possession of the plaintiff.

The Munsif decreed the suit. On appeal, the Subordinate Judge held that if the defendant did not pay the promised price, the plaintiff ought to have sued for its recovery, and dismissed the suit.

The plaintiff appealed to the High Court.

Babu *Karuna Sindhu Mukerjee*, and Moulvi *Mahomed Mustafa Khan*, for the appellant.

Babu *Umakali Mukerjee*, for the respondent.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit in which the plaintiff, who is the appellant before us, sought for a declaration that a deed of sale executed and registered by her in favour of the defendant was void and ineffectual. The plaintiff's case seems to have been that the defendant, after the execution of the deed of sale in question, desired that it should be registered, and promised that he would forthwith pay the consideration-money, and accordingly the plaintiff presented the deed for registration and had it registered, and called upon the defendant to pay the consideration-money. The defendant, however, promised to pay it in a short time, but subsequently declined to make the payment. Thereupon the plaintiff was obliged to issue a notice upon him either to pay the consideration-money or to treat the transaction as cancelled, but the defendant refused to receive the notice.

[9] The case of the other side was that the whole of the consideration-money, with the exception of a small amount, was paid to the plaintiff, and that this was a completed transaction.

The Court of first instance, upon a consideration of the evidence in this case, held that the defendant did not pay any part of the consideration-money, and in the course of the judgment that it delivered brought to light certain facts which indicate that the parties did not consider the transaction as a completed transaction, notwithstanding the registration of the deed. The Munsif accordingly decreed the plaintiff's suit.

We might here mention that notwithstanding the registration of the document in question, it remained in the hands of the plaintiff, and it was not delivered over to the defendants.

The Subordinate Judge, in appeal, has reversed the judgment of the Munsif upon certain grounds which we are not quite able to follow, and he has done so without deciding the question whether any consideration passed from the defendant to the plaintiff. In one portion of his judgment he says: "But there was no evidence in this case beyond the interested statement of the plaintiff's brother, to prove the alleged promise of paying the consideration after registration." That is the only passage

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in which any reference is made to the question of the payment of the consideration-money. He then says that the plaintiff has misconceived his remedy, and that he should have brought a suit not for cancellation of the document but for recovery of the consideration-money; and he refers to s. 54 of the Transfer of Property Act as showing that the transaction was completed so soon as registration was had.

It seems to us that the Subordinate Judge is in error in holding that the mere registration of the document made the transaction a completed transaction. No doubt under s. 54 of the Transfer of Property Act the sale of an immoveable property of the value of one hundred rupees and upwards can only be made by a registered instrument, but it does not follow from this that the moment the instrument is registered it should be taken as conclusive that the title has passed. In the case of *Sheo Narain Singh* v. *Darbari Mahton* (1) where the **[10]** vendor by reason of non-payment by the vendee of the consideration money, transferred the property to a third party, and that third party brought a suit to recover possession of the property upon the strength of his purchase against the first vendee, a Divisional Bench of this Court, upon a question similar to that raised before us in this case, made the following observations: "It was argued before us that, having regard to the provisions of s. 54 of the Transfer of Property Act, the mere registration of the deed of sale conveyed the property. We are not prepared to go to that length. It is true that the Act prevents the property from passing, except the deed be registered, but it does not follow from that, that the mere registration of the deed necessarily passes the property. There might be circumstances that would show that it was not intended that the transfer should have any immediate operation, although the deed had been registered. Registration is required to be made within a certain period after execution, and apart from the section of the Transfer of Property Act, it is not a formality which creates any rights, although it affects the admissibility in evidence of the document. The question as to whether the consideration was paid has a most material bearing on the consideration of the question, whether it was intended that the transfer to the defendant No. 1 should be then and there an operative transfer, or whether it was intended that something further should be done before any effect should be given to it."

We entirely agree in these observations. We think that the registration of a deed does not necessarily make the transaction between the parties concerned complete. We are further of opinion that it was absolutely necessary for the purpose of determining the question of the intention between the parties (for in a case like this the all important question is one of intention) to decide whether consideration actually passed, and what was the understanding between the parties as to the payment thereof. No doubt, in the passage to which we have already referred, the Subordinate Judge says that he does not accept the evidence on the part of the plaintiff that the defendant promised to pay the consideration after registration; but we are not prepared to say that that is really conclusive of the question which the Subordinate Judge had to try. He had to consider whether the consideration really passed, as the defendant **[11]** alleged, and what was the intention of the parties in the matter of the completion of the sale transaction in question; whether it was intended

(1) 2 C. W. N. 207.

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that the title should pass only upon the consideration being paid by the defendant, or upon the mere registration of the instrument in question.

We think that the judgment of the Subordinate Judge, as it stands, cannot be supported. We, therefore, set it aside, and send the case back to him for retrial with reference to the observations which we have made. Costs to abide the result.

This judgment governs the analogous appeal No. 2181 of 1897.

M. N. R. *Appeal allowed; case remanded.*

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27 C. 11=3 C.W.N. 660.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

RAJIB PANDA (*Defendant*) *v.* LAKHAN SENDH MAHAPATRA AND OTHERS (*Plaintiffs*).* [18th July, 1899.]

Fraud—Pleading fraud—Evidence Act (I of 1872) ss. 40 and 44—Existence of a previous judgment inter partes—Relevant fact—Competency of any party against whom such judgment obtained, to prove in a suit between the same parties, that it was obtained by fraud.

In a suit brought by *A* against *B* for *khas* possession of a tank, the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant, to prove his right to *khas* possession. The defence (*inter alia*) was that the decree was a fraudulent one.

Held, that under s. 44 of the Evidence Act (I of 1872) the defendant could show that the decree was obtained by fraud (1).

[N.F., 14 C.L.J. 648 (651)=10 Ind. Cas. 536; F., 23 M. 216 (218); 11 Ind. Cas. 882 (883); R., 24 A. 242 (246)=22 A.W.N. 38; 26 A. 272 (283)=24 A.W.N. 25; 30 C. 369=7 C.W.N. 359; 35 M. 397 (498)=13 Cr.L.J. 352=14 Ind. Cas. 896=12 M.L.T. 1=(1912) M.W.N. 549; 13 C.L.J. 404=16 C.W.N. 805 (810)=10 Ind. Cas. 90; 16 C.L.J. 41=16 Ind. Cas. 447 (448); 16 C.L.J. 552 (553)=14 Ind. Cas. 713; 14 C.W.N. 823=3 Ind. Cas. 116; 22 M.L.J. 490 (610)=(1912) M.W.N. 207; Rel. on, 22 Ind. Cas. 789=19 C.L.J. 29=18 C.W.N. 271; D., 10 C.W.N. 422; 22 T.L.R. 255 (260).]

THIS appeal arose out of an action brought by the plaintiffs to recover *khas* possession of a tank as well as damages on the allegation that the defendant had caught fish in the said tank. In support of their claim the plaintiffs amongst other evidence adduced a petition of compromise, and a decree obtained thereupon in a previous suit between the same parties relating to the same tank. [12] The defendant admitted the plaintiffs' proprietary title, but alleged that he held the tank under the plaintiffs as tenant. As to the decree, he stated that it was obtained by fraud, and therefore it was not binding upon him.

The Court of first instance held that the plea of fraud was not made out and that the plaintiffs' right to *khas* possession was proved, and it accordingly gave the plaintiffs a decree.

On appeal by the defendant the District Judge set aside that decree without coming to any definite finding either on the question of fraud or on the question of tenancy set up by the defendant.

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* Letters Patent Appeal No. 4 of 1899, in appeal from Appellate Decree No. 1996 of 1897, against the decree of the Hon'ble John Foster Stevens, one of the Judges of the High Court, dated the 6th of December 1898.

(1) See 26 C. 891.

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Against this decision the plaintiffs appealed to the High Court, and Mr. Justice Stevens reversed the decree of the District Judge, and restored that of the Munsif on the ground that the case was concluded by the decree in the previous suit, and so long as it was not set aside either by proceedings duly taken in that suit, or by a separate suit brought for the purpose, it was not open to the defendant to challenge it in any subsequent suit in which it was used as evidence against him.

The judgment of Mr. Justice Stevens was as follows :—

"In this case the plaintiffs, the landlords, sued for the recovery of *khas* possession of a tank and for Rs. 25 as damages on account of the defendants' having caught fish in the tank. The defendant admitted the plaintiffs' proprietary title but alleged that he held the tank under the plaintiffs as tenant.

"Amongst other evidence the plaintiffs adduced a petition of compromise and a decree obtained thereupon in a previous suit between the parties relating to the same tank. In that petition of compromise which was filed by the defendant he admitted that he had no right or possession whatsoever in the tank. He stated that he had relinquished possession of the tank and therefore that the Court should not give possession. He undertook to pay Rs. 35 as damages and costs.

"The defendant sought to get rid of the effect of this decree as evidence against him in the present litigation by stating that it had been fraudulently obtained, that he had not been aware of its contents, and that he had been coerced by the plaintiffs into making the compromise. The Court of first instance for detailed reasons, which it gave, disbelieved this allegation of the defendant and gave a decree for the plaintiffs. The lower appellate Court, without actually deciding upon the evidence [13] that the compromise upon which the decree in the former suit was based had in fact been obtained by fraud, says that it appears to be almost certainly fraudulent, having regard to the terms of it and the relative position of the parties, the defendant, as the District Judge says, being an ignorant and foolish man.

"A good deal of time has been taken up by both sides in argument in this Court, and numerous rulings have been cited which have little or no bearing on the questions relating to the petition of compromise and the decree based upon it.

"The whole question really turns upon the construction of s. 44 of the Evidence Act. That section runs as follows: "Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under ss. 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion." The question is whether a party to the suit in which a previous judgment was obtained can be allowed to aver that it was obtained by fraud of his antagonist, though the judgment remains unreversed. This point has not been settled, so far as I have been able to ascertain, either in this country or in England. It was noticed in the case of *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (1), but it was not necessary to decide it for the purpose of that case. An opinion is, however, expressed at p. 715 of the report that such a contention could not be successfully maintained having regard to the recent authorities, especially the case of *Huffer* v. *Allen* (2).

(1) 6 B. 703. (2) (1866) L. R. 2 Exch. 15.

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"I am inclined to take the view that a judgment obtained in a previous litigation cannot be challenged under s. 44 of the Evidence Act by a party to the suit in which it was obtained. It seems to me that a judgment must remain of full effect for all purposes, unless and until it is formally vacated; when a decree has been obtained by fraud it is competent to the party against whom it has been obtained to have it set aside on that ground. In such a case it is necessary that the party setting up fraud should not merely make a general averment of fraud, but that he should distinctly set forth circumstances which constitute the fraud and that he should strictly prove those circumstances. It seems to me difficult to suppose that the Legislature intended to put a party against whom a decree has been passed in a better position when it is adduced in evidence against him in a subsequent litigation than he would have occupied if he had sued to set it aside. I think, therefore, that the defendant was concluded in the present case by the previous decree based upon the compromise.

"It has been urged for the (defendant) respondent that on the finding of the learned Judge the defendant has established a right by adverse possession. [14] There is no express finding by the lower appellate Court to this effect. The learned Judge speaks of the defendant having long possession chiefly on the basis of a finding by the Settlement Officer, but there is no finding that there has been a continuous possession for such a period as would give the defendant a right by adverse possession. Besides as I have said the case is in my opinion concluded by the decree in the previous litigation.

"The appeal is decreed with costs of both the appellate Courts; the decree of the first Court is restored."

Against this decision the defendant preferred an appeal under cl. 15 of the Letters Patent.

Babu *Purno Chunder Shome*, for the appellant.

Mr. *P. O'Kinealy*, Dr. *Ashutosh Moookerjee*, and Babu *Upendra Gopal Mitter*, for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.):—

JUDGMENT.

MACLEAN, C. J.—This is an appeal from a judgment of Mr Justice Stevens.

That learned Judge has stated with accuracy the nature of the respective cases of the plaintiff and of the defendant, and the contentions of the parties, and I do not think any useful object will be attained by my recapitulating them.

The real question we have to decide is, whether the defendant is entitled to show in this suit, that the decree obtained in the previous suit between the same parties was obtained by fraud, or whether or not, so long as that decree stands unreversed, it must be taken to be binding upon him.

I concur with the learned Judge in the Court below in thinking that the question turns upon the construction of s. 44 of the Evidence Act, though, so far as I can gather from his judgment, he scarcely appears to have discussed the actual language of the section.

There is but little authority upon the point in the reported decisions of the Courts of this country, whilst to my mind, the decisions in the Courts of England are of no assistance to us, for we have to consider,

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not what the law in England is [and upon this it may be taken that a decree is binding upon the parties **[15]** so long as it stands unreversed; see *Huffer* v. *Allen* (1)], but what the law is in India, having regard to the provisions of the section in question.

And, in dealing with this point, *i.e.*, in dealing with the construction of an Act intended to codify a particular branch of the law, I may, perhaps, usefully refer to the observations of the late Lord Herschell, in the case of *Bank of England* v. *Vagliano* (2), which have been cited with approval by their Lordships of the Privy Council in the case of *Norendra Nath Sircar* v. *Kamalbasini Dasi* (3).

The section is as follows: "Any party to a suit or other proceeding may shew that any judgment, order or decree, which is relevant under ss. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

The language of the section is very wide, and reading that language literally, in its ordinary acceptation, and according to its ordinary and natural meaning, it certainly covers the present case. I take it we are bound to construe the section according to the plain meaning of the language used, unless we can find either in the section itself or in any other part of the statute, any thing that will either modify or qualify, or alter the statutory language [See *per* Lord Halsbury, L. C., in the case of *Vestry of the Parish of St. John's Hampstead* v. *Cotton* (4)] even if the result of such construction lead to anomalies, or be productive even of absurdity.

Our attention has not been drawn to any words in the section or to other parts of the Act, which modify or qualify the ordinary meaning of the language used.

In the present case we find a decree relevant under s. 40 proved by the plaintiff, the party adverse to the defendant in the suit; how are we to get out of the plain words of the section, and say that the latter may not show that this decree was **[16]** obtained by fraud? It is, perhaps, strange to those conversant with the English practice to hold that a defendant to a suit can, in that suit, shew that a previous judgment obtained against him by the same plaintiff in a previous suit, was obtained by fraud, without initiating independent proceedings to have that judgment set aside. As against that, however, it must be borne in mind that in this country a looser practice would appear to prevail, for, apparently a defendant may challenge, say, a registered mortgage deed, which is being sued upon, without bringing a suit to set it aside. As was pointed out by Lord Morris in the case of *Ali Kadar Bahadur* v. *Indar Parshad* (5) it is not easy to understand how, in such cases, the question comes to be discussed: but if one were at liberty to speculate as to the motives of the Legislature, it is possible that it may have been influenced by some consideration as to this practice, in passing the section now under discussion.

If the section do not cover a case such as the present, to what class of case does it apply, and what is the real object of the section? To this we have received no reply.

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(1) (1866) L. R. 2 Exch. 15.
(2) (1891) L. R. App. Cas. 107 (145).
(3) 23 C. 563=23 I. A. 18.
(4) (1886) L. R. 12 App. Cas. 1 (6).
(5) 23 I. A. 92 (95)=23 C. 950 (954).

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The argument against placing a construction on the section consistent with the ordinary meaning of the language is that it would convert it into a procedure section, and that the Act is one codifying the law of evidence and not one of procedure. But there are several other sections of the Act which import questions of procedure, for example, ss. 66, 135, 136 and 150. I fail, however, to see why, even though it may import a matter of procedure, we should not construe the section according to the ordinary meaning of its language.

As regards authority upon the point, the case of *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (1), was relied npon by the respondents, but upon close examination that case appears to me to be an authority the other way. In that case the first and second defendants set up that the previous decree had been obtained by fraud ; the preliminary issue was (I am not quoting the whole of it, which will be found at p. 705 of the report) "Whether the [17] said decree is not for the purposes *of this suit*, a binding and valid decree * * * and whether the said decree is not *in this suit* binding upon the defendants and each of them, and whether the defendants, or any or either of them, can *in this suit* in any way object or dispute the said decree." The matter was dealt with as upon demurrer. The question to which the learned Judge applied his mind will be found at p. 709 of the report, where he says, "and the question shortly is whether, admitting the allegation of fraud and collusion made by the first and second defendants, they are entitled to set up such fraud and collusion in their defence in this suit, while the decree in suit No. 401 of 1876 stands unreversed."

That issue the learned Judge found in favour of the first and second defendants, and said, after a careful review of the law in England on the subject, that s. 44 of the Evidence Act clearly covered the case.

The learned Judge says: "The language is wide enough to allow a party to the suit in which the judgment was obtained to aver that it was obtained by the fraud of his antagonist, though the judgment stands unreversed," and this view is adopted in the case of *Manohharam* v. *Kalidas* (2).

The case of *Bansi Lal* v. *Ramji Lal* (3) cannot be regarded as an authority in the respondents' favour, for s. 44 was not even mentioned.

So far, then, as authority goes, it would appear to be in the appellant's favour, but apart from authority, in my opinion the defendant was entitled to shew in this suit that the decree in the former suit was obtained by fraud.

Then it is urged that the Courts below ought not to have gone into the question of fraud, but I think they were bound to do so. When the judgment, which was not pleaded, was put in against the defendant, he was entitled to show it was obtained by fraud. No objection was taken to this before the Munsif, and no application was made by the plaintiff for any adjournment on the ground that he was taken by surprise, and the Munsif decided [18] against the case of fraud, and in the present respondents' favour. There is nothing in this point.

I think, however, the respondent is entitled to a remand to have the question of fraud or no fraud, in relation to the previous decree, more precisely found by the District Judge. His finding is very loose. He says: "The compromise upon which the decree in the former suit was passed seems to me to be almost certainly a fraudulent one." That is

(1) 6 B. 703. (2) 19 B. 821 (826). (3) 20 A. 370.

far from sufficient. There must be a remand to ascertain whether the previous decree was obtained by fraud, and if obtained by fraud, whether the tenancy set up by the defendant is established. The decree of Mr. Justice Stevens must be reversed, as also that of the District Judge, and the case remanded, but the respondents must pay the costs both here and before Mr. Justice Stevens.

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BANERJEE, J.—I am of the same opinion. This appeal arises out of a suit brought by the plaintiffs for *khas* or direct possession of a tank, and for damages on account of the defendant having caught fish in the tank. The defendant admitted the plaintiffs' proprietary right in the tank, but denied their right to *khas* possession, and alleged that he was entitled to such possession as their tenant, and he denied his liability for the damages claimed.

At the trial, the plaintiffs put in a decree based on a compromise in a previous suit between them and the defendant to prove their right to *khas* possession. The defendant impeached that decree as fraudulent. But the first Court held that the plea of fraud was not made out, and that the plaintiffs' right to *khas* possession was proved, and it accordingly gave the plaintiffs a decree.

On appeal by the defendant the learned District Juge set aside that decree without coming to any definite finding, either on the question of fraud or on question of the tenancy set up by the defendant, and merely observing in his judgment that the compromise seemed "to be almost certainly a fraudulent one," and that the position of the tank "very strongly corroborates the evidence for the defendant as to his ancient possession of the tank."

[19] On second appeal by the plaintiffs, Mr. Justice Stevens has reversed the decree of the District Judge and restored that of the Munsif on the ground that the case was concluded by the decree in the previous suit, and that so long as it was not set aside either by proceedings duly taken in that suit or by a separate suit brought for the purpose, it was not open to the defendant, who was a party to the decree, to challenge it under s. 44 of the Evidence Act in any subsequent suit in which it is used as evidence against him.

Against that decision the defendant has preferred this appeal, and it is contended on his behalf that it was open to him under s. 44 of the Evidence Act to shew in this suit that the decree relied upon by the plaintiffs was obtained by fraud, and that the case should be remanded to the District Judge to determine the questions of fraud and tenancy upon which he has not come to any clear finding.

On the other hand, it is urged by the learned Counsel for the plaintiffs that the view taken by Mr. Justice Stevens is correct; that s. 44 of the Evidence Act, as its position in the Act would indicate, is intended only to state the rule of law relating to evidence; that a decree of a competent Court may be impeached on the ground of fraud, but it is not intended to lay down any rule of procedure as to how it should be impeached, that is, as to whether the party seeking to impeach it should proceed by a separate suit or not; and that if s. 44 is to have the effect contended for by the defendant, it would lead to certain very anomalous and unreasonable consequences.

After carefully considering the arguments on both sides, I think the contention of the defendant ought to prevail. The question before us is one of the construction of s. 44 of the Indian Evidence Act. The

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proper mode of dealing with such a question is that indicated in the following observations of Lord Herschell in the *Bank of England* v. *Vagliano*(1), which were adopted by the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2); "I think," said his Lordship, "the proper [20] course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." Examining then the language of s. 44 of the Evidence Act which runs in these words: "Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under ss. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion," I find that it provides that a party to a *suit or other proceeding* may shew that a judgment, order or decree which is relevant, under s. 40, that is, which would as a judgment *inter partes*, operate as *res judicata*, or which is relevant under s. 41, that is, which is evidence as a judgment *in rem*, or which is relevant under s. 42, that is, which is evidence as a judgment relating to a public matter, and *which is proved* by the *adverse party*, was passed by a Court which had no jurisdiction to pass it or was obtained by fraud or collusion. Or in other words (confining our attention to so much of the section as bears upon the present case) a party to a suit may shew that a judgment or decree, which is conclusive as a judgment or decree *inter partes* and which has been proved against him by his adversary in that suit, was obtained by fraud. And when may the party shew that the judgment or decree was obtained by fraud? The context evidently shews that the answer must be "In the suit in which the judgment is proved against him by his adversary." The language of the section clearly shows that it is very different from a provision such as the plaintiffs contend it is intended to be, merely declaring that a judgment which is conclusive or admissible in evidence against any party may be impeached by such party on the ground of fraud or collusion. If that had been the object of the section the words "to a suit or other proceeding" and "and which has been proved by the adverse party" would have been wholly unnecessary. To accept the plaintiffs' contention would be to hold that [21] these portions of the section are matters of elaborate surplusage intended to serve no purpose and needlessly introduced into the section, notwithstanding that they are calculated to mislead.

The section makes the same provision for impeaching on the ground of fraud judgments *inter partes*, and judgments *in rem* or judgments relating to public matters. Now it is not disputed, nor can it be disputed (see Taylor on Evidence, 9th edition, s. 1713) that a stranger to a judgment *in rem* or a judgment relating to a public matter against whom such judgment is used in evidence under s. 41 can impeach it on the ground of fraud in the suit in which it is so used. And it is not reasonable to suppose that the same words are used in a different sense when applied to judgments *inter partes*, that is, judgments relevant under s. 40.

Then, again, the section makes the same provision for impeaching a

(1) (1891) L. R. App. Cas. 107. (2) 23 C. 563.

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judgment on the ground of fraud that it does for avoiding a judgment on the ground of want of jurisdiction. Now, there can be no question that in the latter case the objection may be substantiated in the case in which the judgment is used as evidence. It would, therefore, not be reasonable to hold that the provision in the former case, which is expressed in the same words, should have a different meaning.

The language of the section, therefore, is clearly in favour of the construction contended for by the defendant, and against that suggested by the other side. Nor can the position of the section in the Act be taken to control the plain meaning of its language. And I may add that there are many sections of the Evidence Act, such as ss. 66 to 73, 130, 135, 136 and 150, which relate more or less to matters of procedure, so that there is nothing singular or unreasonable in s. 44 laying down, not only a rule of law relating to evidence, but also a rule of procedure.

Let us next examine how far the construction, which the defendant asks us to adopt, does really lead to any anomalous and unreasonable consequences as the plaintiffs contend.

It was contended by the learned Counsel for the plaintiffs that if a party to a suit or proceeding was allowed to shew in such suit or proceeding that a judgment against him was obtained by [22] fraud, it would be open to a judgment-debtor in the course of execution proceedings to impeach the decree sought to be executed—a result which could never have been intended. The answer to this contention is that s. 44, if its language is carefully considered, cannot lead to any such result. For the judgment or decree, which the section allows a party to impeach on the ground of fraud must, as the section says, be one "which has been proved by the adverse party"—a qualification which cannot apply to a decree sought to be executed, a decree not requiring to be proved in the proceedings taken to enforce it. But then it was argued that, if those words are to have full effect given to them, the section will fail to provide for the setting aside by a separate suit of a judgment or decree on the ground of fraud, when such judgment or decree has not yet been used against the party seeking to set it saide. The answer to this argument is that the right of a party to set aside by a suit a judgment or decree on the ground of fraud, exists independently of the provisions of the Evidence Act.

It was next contended by the learned Counsel for the plaintiffs that if the construction proposed by the defendant be adopted, it would be open to a party against whom a suit for money is brought by an executor to the estate of a deceased creditor to show in such suit that probate was obtained by fraud. I do not think any such consequence would follow. For the executor in such a suit has not to prove or even produce the order granting probate, the production of the probate being sufficient for his purpose, and the probate not being a judgment, order or decree, does not come within the scope of the section.

Then it was contended for the plaintiffs that if s. 44 was construed literally it might allow a party to impeach a judgment on the ground of his own fraud. That, however, is an objection which will hold good equally against the plaintiffs' construction of the section. For if a party is not to be allowed to impeach a judgment on the ground of his own fraud he ought to be precluded from doing so quite as much when he seeks to establish such fraud in the case in which the judgment is used as evidence, as when he brings a separate suit for the purpose. If a party is precluded from doing so he is precluded, not by any [23] rule of evidence, but by

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the general principles of justice which prohibit a person to plead his own fraud.

It was further urged that whereas a suit to set aside a decree obtained by fraud must, as provided by art. 95 of sch. II of the Limitation Act, be brought within three years after the fraud becomes known to the party wronged, if the defendant's construction of s. 44 of the Evidence Act be adopted, such party will have unlimited time to impeach a judgment on the ground of fraud. This no doubt is an anomaly. But there is a material difference between the relief obtainable by a suit for setting aside a decree obtained by fraud and that which a party can have by shewing as defendant in an action in which such a decree is used as evidence against him that it was obtained by fraud.

The supposed anomalous and unreasonable consequences pressed upon our attention in the argument for the plaintiffs (respondents) are not, therefore, of a nature such as would justify our rejecting a construction, which is so clearly in accordance with the plain meaning of the words of the section.

There is no dispute that a stranger to a judgment against whom it is used as evidence, either as a judgment *in rem* or as a judgment relating to a public matter, may impeach it on the ground of fraud in any case in which it is so used. Taylor in his Treatise on the Law of Evidence, after stating that the rule on this point is clear, observes (in paragraph 1713) "whether an *innocent party* would be allowed to prove in one Court that a judgment against him in another Court was obtained by fraud is not equally clear, as it would be in his power to apply directly to the Court which pronounced the judgment to vacate it." And Bigelow in his work on the Law of Estoppel says (see page 208), "whether parties may set up fraud has been a subject of conflicting opinion." Thus in systems of law to which our own is more or less allied, the view contended for by the learned Counsel for the plaintiffs is by no means a clearly settled and accepted one.

No doubt the most natural course for a party to a judgment **[24]** who seeks to impeach it for fraud, is to apply to the Court which pronounced the judgment to set it aside. But if it is conceded, as it must be, that in addition to that course a party may also institute a suit directly to set aside a judgment obtained against him by fraud, there is not much reason why he should not also be allowed to avoid its effect in any suit in which it is used as evidence, by shewing in that suit that it was obtained by fraud. On the contrary, by allowing a party to do so, we avoid multiplicity of suits.

It remains now to say a few words with reference to the cases cited. Some of these, as for instance the case of *Bansi Lal* v. *Ramji Lal* (1), are of very little use for our present purpose, as they were decided without any reference to s. 44 of the Evidence Act. Of the remaining cases no one is directly in point upon the question now before us, and if in some of them there occur observations against the defendant's view, there are others, such as the cases of *Nilmony Mookhopadhya* v. *Aimunissa Bibee* (2), *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassimbhoy* (3), and *Manchharam* v. *Kalidas* (4), which contain *dicta* in favour of that view.

For the foregoing reasons I think the contention of the defendant that it is open to him in this case under s. 44 of the Evidence Act to shew that the decree relied upon by the plaintiffs was obtained by fraud,

(1) 20 A. 370. (2) 12 C. 156. (3) 6 B. 703. (4) 19 B. 821 (826).

is correct and ought to prevail, and the judgments of Mr. Justice Stevens and of the District Judge of Cuttack ought to be set aside and the case sent back to the District Judge for disposing of it after determining whether the decree relied upon by the plaintiffs was obtained by fraud, and if it was obtained by fraud, whether the tenancy set up by the defendant is established.

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S. C. G. *Appeal allowed ; case remanded.*

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[25] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Stevens.

THAKUR SINGH (*Plaintiff*) v. BHOGERAJ SINGH AND OTHERS (*Defendants*).* [20th July, 1899.]

Limitation—Possession and actual user—Conflicting evidence of possession—Presumption of possession from title—Title and possession—Onus probandi—Character of land in dispute—Mode of enjoyment

It is only when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail. The principle does not apply where the evidence of possession is equally unworthy of reliance on both sides.

Dharm Singh v. *Hurpershad Singh* (1), explained.

Possession, however, is not necessarily the same as actual user. When therefore the plaintiff has to prove possession of a land in dispute within the statutory period of limitation, if there is anything special in the character of the land, for example, when it is permanently or temporarily incapable of actual enjoyment in any one of the customary modes, a presumption in favour of continuance of possession, though in no sense a conclusive one, may arise.

Mahomed Ali Khan v. *Abdul Gunny* (2), referred to.

[R., 8 C.W.N. 876.]

IN the two suits out of which these appeals arose, the main question was whether the plaintiff was in possession of the disputed lands within twelve years next before the date of the institution of the suits. The plaintiff alleged that the lands in dispute appertained to a *putti* in *mouzah* Pachra, belonging to him and his co-sharers, the defendants second party, and prayed for confirmation of possession after establishment of title.

The defendants first party contended, amongst other things, that the lands did not appertain to the plaintiff's *putti*. Previous to the suits there were some *butwara* proceedings for the partition of the *putti* in question between the plaintiff and his co-sharers ; but the defendants first party having claimed portions of the lands surveyed as appertaining to their *putti*, the Deputy Collector refused to proceed with the partition. Hence the suits.

[26] The Munsif found that the title to the lands in dispute rested with the plaintiff and his co-sharers, excepting a small strip of land. He also found that the plaintiff had failed to prove possession at the date of the suits. Then, as to the question of the plaintiff's possession within twelve years of that date, the Munsif decided that issue in favour of the

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* Appeals from Appellate Decrees Nos. 25 and 159 of 1898, against the decree of Babu Bhagwan Chandra Chatterjee, Subordinate Judge of Tirhoot, dated the 18th of September 1897, reversing the decree of Babu Troylukya Nath Shome, Munsif of Sitamari, dated the 22nd of March, 1897.

(1) 12 C. 38. (2) 9 C. 744=12 C.L.R. 257.

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plaintiff upon grounds set out in the portion of his judgment quoted in the judgment of the High Court. The suits were decreed accordingly.

On appeal the Subordinate Judge held that the suits were barred by limitation and dismissed them.

The plaintiff appealed to the High Court.

Mr. *C. Gregory*, and Babu *Buldeo Narain Singh*, for the appellant.

Babu *Sorashi Charan Mitter*, for the respondents.

JUDGMENT.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was delivered by

STEVENS, J.—The question in dispute in the two cases out of which these appeals arise is as to whether the plots of land with which they are respectively concerned appertained to the *putti* of the plaintiff, or to that of the defendants. It is not necessary to enter into the history of this litigation, which has been pending since the year 1890. Suffice it to say that when the cases came for the last time before the Subordinate Judge of Tirhut on appeal, that officer held that they were barred by limitation, and accordingly dismissed them.

The view held by the Court of first instance was that in both cases the land in dispute was of such a character that neither party had been in regular possession of it. The learned Munsif says: "The disputed lands in suit No. 147 are admittedly *putti* (waste) lands over which neither party cared to exercise acts of possession till shortly before the institution of the suits, and the attempt at definite and lasting possession on both sides gave rise to the disputes. It might very well be that the defendants' tenants coming to live near the lands now and then passed over them or kept cowdung on them, and in the same way the plaintiff and his co-sharers also might have tied their cattle on them. These acts having been occasional, neither party cared to oppose the other. When the plaintiff, [27] however, proceeded to lay claim to them definitely by acts of ownership, and especially by the *batwara* proceedings, the defendants opposed them. As regards the disputed lands in suit No. 40, I am inclined to think that the defendant, Munha Singh, in his evidence before Babu Rajendra Nath, spoke the truth when he said that the lands were formerly swamps. When these swamps became culturable in certain seasons only of the year, it is very probable that now a man on plaintiff's behalf and now a man on defendant's behalf grew crops on such bits as could be sown, the man on behalf of either party sowing such crops as he found convenient, regard being had to the season and the consistency of the soil at the particular period. This accounts for the fact that the witnesses on neither side give any consistent account of the cultivation of the kinds of crops. As in the case of the disputed lands in suit No. 147, so in this case, too, when the swamps gradually became fit for regular cultivation and either partly attempted it, it gave rise to disputes which culminated in the *butwara* proceedings and in these suits. Under such circumstances I think I should hold that possession goes with title. *Dharm Singh* v. *Hurpershad Singh* (1)."

The Munsif had previously remarked that he found it difficult to rely upon the general statements of the plaintiff's witnesses as to possession, and that the evidence of the witnesses for the defendants was also equally unworthy of reliance. Upon the merits of the case the Munsif found

(1) 12 C. 38.

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that the plaintiff was entitled to recover a portion of the land for which he sued.

The learned Subordinate Judge was, we think, right in holding that the Court of first instance did not correctly apply the case of *Dharm Singh* v. *Hurpershad Singh* (1), and that the true application of that case would be where the evidence of possession is strong on both sides and apparently equally balanced, in which case preference should be given to the evidence on the side of the party with whom the title was found. At the same time he does not appear to have considered the case from the point of view from which we think it ought to have been considered in the light of what the Munsif says about the character of the lands in dispute.

[28] As to the question what in fact was the character of the lands he does not say anything, and we do not know whether he differed from the Court of first instance on that point. The learned Subordinate Judge seems to lay down as a general proposition that if the evidence of the plaintiff, on whom lies the onus to prove possession, be not worthy of reliance, he cannot succeed even if he had a good title. There are, however, certain classes of cases to which a general proposition of this kind would not be applicable, because it may be that the lands in dispute are of such a character that they do not permit of actual enjoyment in any of the ordinary modes. We would refer to the case of *Mahomed Ali Khan* v. *Abdul Gunny* (2) decided by a Full Bench of this Court. That was a case of jungle lands, as to which it was stated that the plaintiff and the defendant had good title jointly; that at the date of a *thakbast* in 1859, they were in joint possession; that the whole of the lands were then jungle, yielding, however, some kind of profit which had been variously described; that at some time or times subsequent to that date, but more than ten years before the institution of the suit a portion of the lands was brought under cultivation, and that of the lands so reclaimed the defendants had been in possession from the time of their reclamation. The Court below had held that it was for the plaintiffs to prove that they had been in possession within twelve years prior to the suit and found that they had failed to discharge the onus. It was pointed out by this Court that, although there was no doubt as to the general rule that it lay upon the plaintiff to show possession within twelve years, possession is not necessarily the same thing as actual user. "The nature of the possession to be looked for," it was said, "and the evidence of its continuance must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as **[29]** in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed." It was again remarked: "When lands, which have been

(1) 12 C. 38.

(2) 9 C. 744=12 C. L. R. 257.

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in such a condition as to be incapable of enjoyment in the ordinary modes are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land the exact date at which its condition became altered. And as the plaintiff, who has complied with the conditions we have indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains unchanged, it is essential to enquire on whom the burden of proof of the date of the change lies." After considering this point, the learned Judges observed that the presumption which would arise would be in no sense a conclusive one; that its bearing upon each particular case must depend upon the circumstances of the case; and that it was always liable to be rebutted by evidence. They considered that, having regard to the circumstances of that case, the question of limitation ought to be considered together with all the evidence, and they remanded the case to the Court below in order that it might be so considered.

We desire to draw the attention of the learned Subordinate Judge to that case, as it does not appear to us that he has considered these cases from the points of view therein indicated, and in our judgment if the Munsif is correct in his view as to the character of the lands in dispute, it is essentially necessary to the right decision of the question of limitation in the present cases that it should be considered with the whole of the evidence in the case. It is necessary that he should in the first place consider whether there is, as the Munsif found, anything special in the character of the lands, and if he finds that they have such a special character, he should inquire into the [30] nature of the possession which either party enjoyed, and then determine the question of limitation upon the whole of the evidence in the case.

We very much regret the necessity of prolonging this already unduly protracted litigation; but we feel that it is necessary in the ends of justice to make this remand.

We accordingly remand these cases to the Subordinate Judge for retrial with reference to these observations.

Costs will follow the result.

M. N. R. *Appeals allowed; cases remanded.*

27 C. 30=4 C.W.N. 79.

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APPELLATE CIVIL.

27 C. 30=4 C.W.N. 79.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

DINO NATH CHUCKERBUTTY (*Defendant*) *v.* PRATAP CHANDRA GOSWAMI (*Plaintiff*).* [15th May, 1899.]

Right of Suit—Suit for declaration and enforcement of a hereditary right to officiate as priest—Code of Civil Procedure (Act XIV of 1882), *s.* 11*—Mesne profits— Suit to have a shsre in the offerings made to a deity, by one member of a family, against another, based upon an implied arrangement amongst them.*

A suit by one member of a family against another for the declaration and enforcement of a hereditary right to officiate as priest at the worship performed by votaries at the foot of a certain tree, and also to have a share in the offerings made to the deity, is maintainable.

Kali Kanta Surma v. *Gouri Prosad Surma* (1) followed.

Jowahur Misser v. *Bhagoo Misser* (2) and *Kashi Chandra Chuckerbutty* v. *Kailash Chundra Bandopadhya* (3), distinguished.

[F., 17 M.L.J. 491 (492); R., 11 Ind. Cas. 231=96 P.R. 1911=216 P.L.R. 1911=143 P.W.R. 1911; Disc., 12 C.L.J. 74=14 C.W.N. 1057=6 Ind. Cas. 864; D., 13 C.L.J. 449=17 C.W.N. 347 (349)=10 Ind. Cas. 41.]

THIS appeal arose out of a suit brought by the plaintiff to obtain a declaration of his right to worship a certain tree, to have a share in the offerings made to the deity, and for a decree for possession. The plaintiff's allegation was that one Jagannath [31] Chuckerbutty was the common ancestor of the parties, and upon his death his three sons as *shebaits* performed the worship of the said tree and enjoyed the profits thereof in equal shares; that Goluck Nath Chuckerbutty, his maternal grandfather, was a *shebait* of the presiding deity, and was in rightful enjoyment of a one-twelfth share of the profits, having been an heir of one of the sons of the said Jagannath Chuckerbutty; that after the death of the said Goluck Nath Chuckerbutty, his widow, and then his daughter, the mother of the plaintiff, were in possession of the said share by enjoyment of the profits derived from the worship of the deity; that since the death of Goluck Nath, the profits were at first realized under the management of Sital Nath, brother of Goluck Nath, and afterwards under that of the defendant No. 1; that the profits due on account of Goluck Nath's share were received by his (the plaintiff's) mother through the said Sital Nath, and afterwards through defendant No. 1; that after his mother's death he received the said profits up to the year 1296 B. S. (1889) when the defendant No. 1 refused to pay the share. Hence the suit was brought.

The defence of the defendant No. 1, who alone contested the suit, was mainly that the suit was not maintainable.

The Court of first instance overruled the objections and decreed the plaintiff's suit.

On appeal to the Subordinate Judge that decision was confirmed.

Against that decision the defendant appealed to the High Court.

Dr. *Ashutosh Mookerjee*, and Babu *Preo Sankar Majumdar*, for the appellant.

* Appeal from Appellate Decree No. 1324 of 1897, against the decree of Babu Mohim Chandra Ghose, Subordinate Judge of Faridpur, dated the 26th of April 1897, affirming the decree of Babu Debendra Nath Banerjee, Munsif of Goalundo, dated the 30th March 1896.

(1) 17 C. 906. (2) (1857) 13 S.D.A. Part I, 362. (3) 26 C. 356.

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Babu *Sreenath Dass*, and Babu *Shiba Prosonno Bhattacharyya*, for the respondent.

JUDGMENT.

The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was delivered by

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff, respondent, to obtain a declaration that his maternal grandfather Goluck Nath Chuckerbutty was a *shebait* of the [32] presiding deity Sri Sri Raj Rajeswar Deb of the tree of Iswar Raj Rajeswar standing on a certain piece of land, within boundaries stated in the plaint, and was in rightful enjoyment of a 1 anna 6 gundas 2 karas 2 krants share, that is a one-twelfth share of the profits pertaining to the said tree, for a further declaration that the plaintiff, as one of his daughter's sons, is entitled to a 13 gundas 1 kara and 1 krant, that is, a one-twenty-fourth share, and for a decree for possession of this last-mentioned share, and for mesne profits for the three years immediately preceding the institution of the suit, the mesne profits being estimated at Rs. 50.

The defendant No. 1 alone defended the suit, and his defence, so far as it is necessary to be considered for the purposes of this appeal, was that the suit was not maintainable, and that the claim for mesne profits was excessive. The Courts below have found for the plaintiff and given him a decree.

In second appeal it is contended, on behalf of the defendant No. 1, *first*, that the present suit is not maintainable, and, *secondly*, that there cannot be any decree for mesne profits in such a suit.

In support of the first contention, the case of *Jowahur Misser* v. *Bhagoo Misser* (1) is relied upon. But that case is clearly distinguishable from the present. There, what was claimed was a share in the gratuity or voluntary gift made of certain property to a member of the plaintiff's family as the priest officiating at a *sradh* ceremony, and the Sudder Dewany Adawlat held that such a claim was not maintainable, because the fee paid was in the nature of a voluntary gift to the person to whom it was directly made. That, however, is not the nature of the present claim. What is claimed in the present suit is a right to officiate as *shebait* or priest, at the worship performed by votaries at the foot of a certain tree, and to share the offerings made at such worship, the right to officiate as such *shebait* being claimed by the plaintiff as an hereditary right belonging to the members of a certain family of which he himself is a member.

A suit for the declaration and enforcement of such a right is in our opinion clearly maintainable having regard to s. 11 of [33] the Code of Civil Procedure, and to the case of *Kali Kanta Surma* v. *Gouri Prosad Surma* (2) and the cases therein referred to. The suit, therefore, so far as it asks for a declaration of the plaintiff's right, as set out in the plaint, is clearly maintainable.

It is then contended that there cannot be any decree for possession. This part of the appellant's contention seems to us to be right, and in fact the correctness of this contention is not disputed on the other side.

In support of the second contention of the appellant, it is argued, on the authority of the case of *Kashi Chandra Chuckerbutty* v. *Kailash Chandra Bandopadhya* (3), that a suit for mesne profits, which consisted in the offerings made to an idol, is not maintainable. But we think the

(1) (1857) 13 S.D.A. Part. I, 362. (2) 17 C. 906. (3) 26 C. 356.

case cited is distinguishable from the present. There the suit was brought against a trespasser, who had kept the rightful owner out of possession for recovery of possession, and for mesne profits, and it was held that no decree for mesne profits could be made owing to the uncertainty of the amount, and owing also to the fact that, in so far as the offerings were intended as voluntary gifts to the person officiating at the time, the plaintiff, even though he was the rightful *shebait*, could not claim any portion of it. Here the claim strictly speaking is not one for mesne profits in the ordinary sense of the term. It is made, not as against a trespasser, but as against a person who was rightfully in receipt of the offerings as a member of the family to which the plaintiff himself belongs, and the claim is based upon what must have been an implied, if not an express, arrangement among the members of the family, that all the members of the family should have a share in the offerings made to the tree, which were collected by the defendant No. 1. The finding of the Court below, though not very clear, must be taken in substance to be that the offerings were so collected. That being so, the plaintiff would be entitled to his share in the profits made until the parties come to a different arrangement, such as a partition, by performing the worship by turns.

[34] Upon the question of the amount of these profits the order of the lower Court is, that it should be determined in execution of the decree. It is very doubtful whether s. 212 of the Code of Civil Procedure is applicable to such a case, and whether the amount can be left to be so ascertained. But it is not necessary to consider this question, as the parties have come to an agreement as to the amount, and they consent to a decree being made for Rs. 60 in respect of the mesne profits up to this day.

The result then is that the decrees of the Courts below will be varied by limiting them to a grant of a declaration of the plaintiff's right; and by striking out so much thereof as awards possession, and by substituting for the order for determination of the mesne profits in execution of decree, a decree awarding Rs. 60 as the amount of the mesne profits, leaving the order for costs as it stands in those decrees. In this appeal there will be no order for costs.

S. C. G. *Decree varied.*

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27 C. 34=4 C.W.N. 417.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

MADHUSUDAN DAS AND ANOTHER *(Judgment-debtors)*, *Petitioners v.* GOBINDA PRIA CHOWDHURANI (*Decree-holder*), *Opposite Party.**
[12th July, 1899.]

Civil Procedure Code (Act XIV of 1882), s. 244—Question in execution of decree—Possession in execution of decree after sale—Question arising between the parties or their representatives—Separate suit—Appeal.

Proceedings for the delivery of possession to the auction-purchaser, after sale in execution of a decree, are proceedings in execution of the decree; and when the

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* Appeals from Appellate Orders Nos. 445 and 484 of 1898, against the order of S. N. Huda, Esq., Officiating District Judge of Noakhali, dated the 22nd of August 1898, reversing the order of Babu Saroda Prasad Sen, Munsif of Lakshmipur, dated the 2nd of July 1898.

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application for possession is resisted by the legal representative of the judgment-debtor on the allegation that portions of the property belonged to him and not to the judgment-debtor, the question raised comes under s. 244 of the Civil Procedure Code and must be decided under that section and not by a separate suit.

[F., 30 A. 72=5 A.L.J. 20=28 A.W.N. 12; 35 B. 452=13 Bom. L.R. 661 (663)=11 Ind. Cas. 987; 20 Ind. Cas. 874=18 C.W.N. 27; 26 M. 740 (741)=13 M.L.J. 237; 28 M. 87=14 M.L.J. 474 (475); 7 C.L.J. 436 (438); R., 34 B.546=12 Bom.L.R. 539 (542)=7 Ind. Cas. 457; 31 C. 737 (742); 3 A L.J. 234=26 A.W.N. 87; 5 A. L.J. 285 (287)= 28 A.W.N. 122; 8 C.W.N. 49 (50); 1 S. L. R. 172 (174); 25 Ind. Cas. 267=20 C.L.J. 433; Cons, 6 A. L. J. 71 (93, 94); D., 6 C. L. J. 749 (750).]

GOBINDA PRIA CHOWDHURANI obtained decrees for rent against one Ram Kamal Das, deceased, in respect of two separate [35] holdings, and purchased them herself in execution of the decrees. She applied for *khas* possession of the holdings by ejecting therefrom the sons of the deceased judgment-debtor, Madhusudan Das and Joy Chundra Das. Thereupon they opposed the applications alleging that long before the applicant got the decrees for rent, their father had sold them the whole of the one and one-half of the other holding, and that, therefore, the applicant could not disturb their possession of the same.

The Munsif held that the sales by the father to the sons were not collusive; that the applicant had already recognized one of the objectors in a previous rent suit and by granting receipts, although neither of them was made a party in the rent suit out of which the present cases arose; and that the objectors were in possession of the disputed holdings. He accordingly held that if the objectors had acquired no title by their purchase, that point should be settled by a regular suit, but that the applicant could not get *khas* possession of the land in dispute. He, however, ordered that symbolical possession might be given to her.

On appeal by the applicant, auction-purchaser, the District Judge, without expressing any decided opinion about the *bona fides* or otherwise of the sale-deeds of the objectors, held that she was entitled to get *khas* possession of the lands in question. He held, however, that the objectors were at liberty to bring a regular suit to establish their title to the lands in dispute on the strength of their purchase, and decreed the appeals.

The objectors appealed to the High Court.

Babu *Baikanta Nath Das*, for the appellants.

Babu *Basanta Kumar Bose*, and Babu *Jnanendra Mohun Das*, for the respondent.

The following judgment was delivered by the High Court (MACPHERSON AND STEVENS, JJ.):—

JUDGMENT.

The respondent purchased two *jotes* at sales in execution of two decrees which she had obtained against Ram Kamal Das for the rent due in respect of them. After obtaining the sale certificates she applied for *khas* possession as against Ram Kamal's sons who, we must take it, were put on the record as representatives [36] of their deceased father. The sons resisted the application alleging that they had purchased the whole of one and half of the other *jote* from their father prior to the rent suits, that the respondent had recognized them as tenants, and that they were not bound by the decree to which they were not parties. In support of their contentions they put in the *kabalas* by which they had purchased the *jotes* and some other documentary evidence. Both

Courts considered that the questions raised could only by decided in a regular suit to be brought by one or other of the parties, and that they could not be decided under s. 244 of the Civil Procedure Code. The Munsif, holding that it was for the respondent to bring such a suit, declined to give her any thing more than symbolical possession. The District Judge on the respondent's appeal held that it was for the appellants, Ram Kamal's sons, to bring such a suit, and that in the meantime *khas* possession must be given to the respondent. These appeals are preferred against this order of the District Judge.

Neither Court has definitely decided the questions raised, but if the case comes under s. 244 those questions obviously must be decided under that section and not by separate suit. If the case does not come under s. 244, it is equally obvious that there was no appeal to the District Court, and that there is no second appeal to this Court. We must, therefore, determine whether s. 244 applies.

It undoubtedly does apply as regards the parties, for there is on the one side the plaintiff, who is the decree-holder and the auction-purchaser, and on the other the representatives of the judgment-debtor. The fact that they claim the *jote* not through the judgment-debtor but adversely to him would not prevent the operation of s. 244—See *Punchanun Bundopadhya* v. *Rabia Bibi* (1). The plaintiff is also none the less a party to the suit because she happens to be the auction-purchaser. Is then the question raised one relating to the execution of the decree? That question is whether the *jotes* sold at the execution sale belonged to the judgment-debtor or to the persons who now represent [37] the judgment-debtor, and from whom it is sought to obtain possession with the aid of the Court. There is also another question involved, and that is whether, having regard to the provisions of the Tenancy Act (if those provisions apply) the *jotes* were not properly sold in execution of the decrees obtained against the appellant's father so as to bind the appellants even if the *jotes* do belong to them.

As the appellants do not claim through or under their father, the sale certificate has not the effect of vesting the *jotes* in the purchaser as against them, but the purchaser is entitled to ask the Court to put her in possession of what she has purchased, and, subject to the provisions of ss. 317 and 318, and ss. 328 to 335 relating to resistance to execution, the Court is bound to give her possession of some kind. Proceedings for the delivery of possession are, we think, proceedings in execution of the decree. They undoubtedly are so when the decree is for possession, as the proceedings are necessary in order to give effect to the decree, and any question which arose as to the land which the decree-holder was entitled to get under the decree would certainly be a question relating to the execution of the decree. The matter is not so clear when possession has to be given of land which has been sold in execution of a decree. It may be said that the decree is fully executed when the sale is confirmed, and that questions afterwards arising between the auction-purchasers and the judgment-debtor or others in connection with the delivery of possession of the property sold are not questions affecting the execution of the decree. They may not affect it in the sense of impeaching the sale, but when the law provides for the delivery of possession to the auction-purchaser by proceedings which form a part of the proceedings in connection with the execution of the decree, any question arising as to the kind of possession

(1) 17 C. 711.

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to which he is entitled, is, we consider, a question relating to the execution of the decree within the meaning of s. 244. Here the respondent, the decree-holder, says the land is in the possession of the appellants, who are the representatives of the judgment-debtor, and that she is entitled to get as against them *khas* possession. The appellants do not deny that the land is in their actual possession, [38] and that they are the representatives of the judgment-debtor, but they say they are not bound by the decree to which they are not parties, and that the land is their own and not that of the person whom they represent. Both as regards the parties and the subject-matter of the dispute, the case comes, we consider, under s. 244, and must be decided under that section and not by a separate suit. If such a suit was brought it would certainly be open to the objection, whatever the Court may now say, that it was not maintainable.

We hold that an appeal does lie and we set aside the decision of both Courts. The case must go back to the first Court to be dealt with and disposed of under s. 244. The parties will be at liberty to adduce additional evidence, and the costs of this Court, and of the lower appellate Court, will abide the result.

M. N. R. *Appeal decreed*; *Case remanded.*

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27 C. 38=4 C.W.N. 87.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

HARIDAS ACHARJIA CHOWDHRY AND OTHERS (*Plaintiffs*) *v.* BARODA KISHORE ACHARJIA CHOWDHRY AND OTHERS (*Defendants*).*
[9th June, 1899.]

Attachment—Subjects of attachment—Civil Procedure Code (XIV of 1882), s. 266—Meaning of the word " debt "—Attachment in execution of decree—Prohibitory order—Attachment of maintenance allowance.

The word "debt" in s. 266 of the Civil Procedure Code means an actually existing debt, that is, a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen.

When, therefore, *A* is bound under a deed to pay to *B* a monthly maintenance allowance during the life-time of the latter, there cannot be a valid attachment of any portion of the allowance by a prohibitory order issued to *A* of a date anterior to the time when the same falls due to *B*.

[F., 28 C. 483, (485); 9 C.W.N. 703; R., 30 A. 246=5 A.L.J. 251=28 A.W.N. 101=4 M.L.T. 10; 38 C. 13=12 C.L.J. 130=14 C.W.N. 918=6 Ind. Cas. 826; 7 C.L.J. 658=12 C.W.N. 145; 14 C.L.J. 127=16 C.W.N. 14=11 Ind. Cas. 422 (424); D., 23 A. 164 (165)=21 A.W.N. 50.]

BISHAN CHAND DUDHURIA obtained a decree against [39] Shukhomoye Debi Chowdhrani, the defendant No. 2, on the 19th November 1883, for the sum of Rs. 6,148 and odd annas, and the said decree was purchased by the late Durgadas Acharjia Chowdhry, father of the plaintiffs, Haridas and Tarukdas.

Baroda Kishore Acharjia Chowdhry, defendant No. 1, executed a deed, dated the 19th Bhadra 1292 (September 1885) in favour of his

* Appeal from Appellate Decree No. 1700 of 1897, against the decree of R. H. Anderson, Esq., District Judge of Mymensingh, dated the 26th of May 1897, affirming the decree of Babu Krishna Chandra Chatterjee, Subordinate Judge of that District, dated the 31st of March 1896.

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adoptive mother, the defendant No. 2, binding himself, amongst other things, to pay her, from the month of Assin 1292, during her life, a monthly allowance of Rs. 100, and as security for the payment of the said allowance mortgaged a property mentioned in the said deed.

The plaintiffs' father having applied for the execution of the said decree against the defendant No. 2, the Court issued the following prohibitory order to the defendant No. 1, on the 5th August 1887 :—

"That the decree-holder having put in a petition stating that the said judgment-debtor under letter (sic) dated the 19th Bhadra 1292 acquired the right of getting from you a monthly allowance of Rs. 100 equal to a yearly allowance of Rs. 1,200 and praying that the amount of the said monthly allowance should be attached and deducted on account of the money due under the decree, *purwana*, and as order has been passed for attachment of one-half of the allowance due to the judgment-debtor, you are, therefore, informed under order passed to-day that, if the sum of Rs. 100 be due from you to the debtor, you should not pay a moiety of the said amount to the debtor until further order be passed by this Court, and that you should duly deposit the said moiety into the Court."

Durgadas Acharjia then prayed for execution of the decree by the sale of the attached half of the monthly allowance due from August 1887 to August 1888, and it was sold on the 20th May 1889 and purchased by the decree-holder. The defendant No. 1 not having paid the amount of the said allowance, the plaintiffs instituted a suit in the Court of the Sudder Munsif of the District against him for the recovery of the sum, and obtained a decree which was upheld by the High Court.

Then on the application of the plaintiffs, a notice, dated the 16th January 1891, was served on the defendant No. 1, asking him to deposit in Court the sum of Rs. 1,350, being the amount of the attached allowance *due* at the rate of Rs. 50 per **[40]** month from September 1888 to November 1890. After some proceedings in execution, the said allowance was sold on the 20th May 1891 and purchased by the plaintiffs for Rs.165. The present suit was instituted by the plaintiffs to recover from defendant No. 1 the sum of Rs. 1,350 and for other incidental reliefs.

The defendant No. 1 denied his liability, alleging, amongst other things, that there was no portion of the allowance money in suit remaining unpaid by him on the date when the plaintiff made the auction-purchase, *i. e.*, on the 20th May 1891, and that the attachment by the prohibitory order was invalid.

The Munsif dismissed the suit, and the decision was confirmed on appeal by the District Judge.

The plaintiffs appealed to the High Court.

Mr. *Hill*, Babu *Hari Mohan Chakravarti*, Dr. *Asutosh Mookerjee*, and Babu *Tarak Chandra Chakravarti*, for the appellants.

Dr. *Rash Behari Ghose*, Babu *Dwarka Nath Chakravarti*, and Babu *Joygopal Ghose*, for the respondents.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows :—

JUDGMENT.

This appeal raises, amongst other questions, the question of the meaning of the word "debt" in s. 266 of the Civil Procedure Code, which describes the property liable to attachment and sale in execution of a decree.

It appears that one Bishan Chand Dudhuria in 1883 obtained a decree against the second defendant, who is the adoptive mother of the

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first defendant, and that this decree was purchased by the plaintiffs' father. In 1885 the first defendant executed a deed by which he bound himself to pay to the second defendant a maintenance allowance of 100 rupees per month during the time of her life, and he secured the payment of that sum by the mortgage of certain properties. On 5th August 1887 the plaintiffs, in execution of the decree purchased by their father, obtained a prohibitory order upon the first defendant directing him not to pay half the amount of the maintenance allowance to [41] the second defendant. It will be necessary hereafter to refer more particularly to the exact terms of that order, but under it half the maintenance allowance for the period extending from August 1887 to 1888 was attached, sold, and purchased by the plaintiffs. The plaintiffs then brought a suit against the first defendant to obtain that money, and got a decree. Subsequent to this the plaintiffs, again acting upon the prohibitory order of the 5th August 1887, proceeded to sell through the Court in execution of their decree half the allowance due from the period extending from September 1888 to November 1890, amounting to Rs. 1,350, and on the 20th May 1891 they purchased the allowance so due for Rs. 165. The present suit is brought against the first defendant to enforce the payment of that amount.

Both the lower Courts have held that before the 20th May 1891, the date of the plaintiffs' purchase, and even before the issue of the notice to the 16th January 1891 calling upon the defendant to pay the money into Court, the amount claimed had been paid to the second defendant and that there was nothing due. That being so, it seems clear that the plaintiffs by their purchase bought nothing as the debt purchased by them had been satisfied and was not then in existence.

In this state of things Mr. Hill for the appellants has contended that the first defendant is not entitled to plead payment of this debt, as the effect of the prohibitory order of the 5th August 1887 was to attach the money; and that any payment by the first defendant subsequent to such attachment was null and void. That, therefore, raises the question whether the order of the 5th August 1887 effected any valid attachment of the money now claimed. Section 266 of the Civil Procedure Code provides that debts, amongst other things, may be attached and sold, and the question, therefore, is what is the meaning of the word "debt" in that section.

We think it is clear that a debt may include a sum of money due by one person to another, and which is actually payable at the time, as well as a sum of money which is due but not actually payable then. We will assume that the word as used in s. 266 has the wider meaning and includes both descriptions, as it is not necessary for the purposes of this case to restrict the [42] meaning. All the authorities seem to show that a debt must be a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time, or the payment of which depends upon contingencies which may or may not happen. The Common Law Procedure Act in England provides that "debts due or accruing" may be attached, and the construction which was put upon the word "accruing" was that it must be an actually existing debt and not merely a debt which might or might not become due. The case of *Tuffazal Hossein Khan* v. *Raghu Nath Prasad* (1) also clearly indicates that an attachment must operate at the time of attachment upon

(1) 7 B.L.R. 186=14 M.I.A. 40.

some existing debt, and that it must not be of an anticipatory character, so as to fasten upon some future state of property. There must be at least an existing debt though it may be payable on a future date. It seems to us impossible to hold that on the 5th August 1887 there was any existing debt in respect of the maintenance allowance which might become payable during the period extending from September 1888 to November 1890. The allowance was only payable to the second defendant during her life-time. If she died before September 1888 there obviously would have been no money due at all. We think, therefore, that the Court could not, on the 5th August 1887, legally attach the money that might become payable as maintenance to the second defendant for the period extending from September 1888 to November 1890, and that there was no legal attachment of that money.

The attachment order of the 5th August 1887 is, moreover, giving it the widest scope, of an extremely ambiguous character, and cannot be said to operate as an attachment of the sum of money now claimed. It recites that the judgment-debtor is entitled to get from the first defendant a monthly allowance of Rs. 100; that the decree-holder prays that the amount of the monthly allowance should be attached and appropriated to the satisfaction of his decree; and that an order for the attachment of half the allowance due to the judgment-debtor has been passed. It then proceeds thus, "you are, therefore, informed under order passed to-day that, if the sum of Rs. 100 be due from you to [43] the debtor you should not pay a moiety of the said amount to the debtor until further orders are passed by the Court, and that you should deposit the said moiety in Court." There is nothing in that order, whatever its intention may be, to effect an attachment of the money now claimed. It is also, we think, a very doubtful question, whether the attachment made by the order was not spent when the property attached under it was sold. It is not necessary, however, to decide that question as we think there was no valid attachment of the debt sold at the sale of the 20th May, 1891; and, as already stated, there was no existing debt at that time. It follows that the plaintiffs acquired nothing by their purchase, and that there was nothing to prevent the first defendant from paying the money to the second defendant.

In the previous proceedings to enforce payment of the maintenance charge for the earlier period extending from August 1887 to August 1888, the plaintiffs obtained a decree which was confirmed up to this Court. It was suggested, but hardly argued, that *that* decree operated as *res judicata* in the present case. It is sufficient to say that the decree has not been put in, and that the contention is on that ground untenable. Besides this, for the reasons given by the District Judge, if for no other reasons, the decree could not operate as *res judicata* in the matter now in dispute. The previous suit was cognizable by the Munsif and was tried and determined by him. The present case was cognizable only by the Subordinate Judge and was tried by him.

We have been referred to the judgment of this Court in that suit by way of a precedent; but it appears to us that it has no bearing on the present case. Then, at the time of the sale, there appears to have been a debt actually due by the first defendant to the second defendant, and the main question was whether the sale was vitiated by the absence of an attachment. The Court considered that the omission to attach did not vitiate the sale; but it also considered that there was an attachment of

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some kind sufficient to give validity to the sale. It did not, however, hold that *that* attachment was effected by the order of the 5th August 1887.

We think that the decision of the District Judge in this case is right. The appeal is accordingly dismissed with costs.

M. N. R. *Appeal dismissed.*

27 C. 44.

[44] ORIGINAL CIVIL.

Before Mr. Justice Stanley.

RAJNARAIN BHADURY AND OTHERS *v.* ASHUTOSH CHUCKERBUTTY.*
[7th September, 1899.]

Hindu law—Will—Construction of will—Dyabhagha family—Disposition to widow as " malikatwa."

K, a Hindu, died without issue leaving him surviving a widow *B*, having made and published his will wherein he stated, "I appoint my wife *B* to the '*malikatwa*' after my demise as exercised by myself in respect of the family dwelling-house . . . . . wearing apparel, utensils, &c., whatever there is in respect of all the property aforesaid." *B* upon the death of *K* took possession of his properties. Upon *B*'s death the plaintiffs, who claimed to be *K*'s nearest of kin, brought this suit contending that the words of the will only conveyed a life estate to his widow *B*, and that after her death they were entitled to *K*'s properties. The defendant, who claimed to be *B*'s nearest of kin, contended that the words of the will gave *B* an absolute estate in *K*'s properties, and that he was entitled to the whole estate.

Held, that the intention of the testator was to give his widow *B* an absolute heritable and alienable estate in his properties.

[**Affirm.**, 27 C. 649; **F.**, 29 A. 217=4 A.L.J. 68=27 A.W N. 19; **R.**, 5 Bom.L.R. 334 (339); 14 C.W.N. 458 (461)=5 Ind. Cas. 73; 11 Ind. Cas. 846=61 P.R. 1911=147 P.W.R. 1911; 9 O.C. 119 (122); 1 S.L.R. 211; **D.**, 30 C. 30 (32).]

THE plaintiffs in this case alleged that one Gunga Gobind Bhadury, a Hindu inhabitant of Calcutta, governed by the Bengal School of Hindu law, died intestate, leaving him surviving two sons, Joynarain Bhadury and Roodnarain Bhadury. Joynarain Bhadury died intestate leaving him surviving an only son Nilmoney Bhadury. Nilmoney Bhadury died intestate leaving him surving an only son Kristo Lall Bhadury. Kristo Lall Bhadury died intestate and without issue, but leaving a widow, Srimati Bhubunessari Dabee; he also died possessed of considerable property, both moveable and immoveable, including the house and premises No. 41, Kally Prosad Dutt's Street, in Calcutta, and all his property after his death was taken possession of by his widow Bhubunessari Dabee. In the year 1873, No. 41, Kally Prosad Dutt's Street was acquired by Government, and the compensation money in respect thereof, amounting to about Rs. 2,200, was received by Bhubunessari Dabee as the widow and heiress of Kristo Lall Bhadury, and Bhubunessari Dabee, out of the money so received from [45] Government and other monies belonging to the estate of Kristo Lall Bhadury, from time to time purchased and acquired various immoveable properties. Bhubunessari Dabee died on or about the 17th January 1898 intestate, and the defendant, who was a relative of hers, and used to reside with her and manage the estate on her behalf, upon her death wrongfully took possession of the estate of Kristo Lall Bhadury, including the immoveable properties

* Original Civil Suit No. 207 of 1898.

purchased by Bhuhunessari Dabee. The plaintiffs also state that Roodnarain Bhadury died intestate leaving an only son Debnarain Bhadury, who also died leaving him surviving the plaintiffs, his legal heirs and representatives; that both Roodnarain Bhadury and Debnarain Bhadury died before Bhubunessari Dabee, and the plaintiffs upon her death were the nearest of kin of Kristo Lall Bhadury deceased, and were as such entitled to the estate left by him including the immoveable properties purchased by Bhubunessari Dabee.

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The defendant alleged that Kristo Lall Bhadury, also called Krishna Lall Bhadury, before his death, and on the 20th Joisto 1269, corresponding with the 2nd June 1862, made and published his last will and testament in the Bengali language, whereby he bequeathed all his property, including the house and premises No. 41, Kally Prosad Dutt's Street, to his widow Bhubunessari Dabee. The translation of the will was as follows:—

"To the blessed Srimati Bhubunessari Dabee.

This instrument of willnamah (will) is executed by Sri Krishna Lall Bhadury to the following effect: I having by reason of ill-health come to the house of my father-in-law Srijut Nilmoney Chuckerbati Mahashaye, at Mouzah Novagram, in the District of Hughli, and not having recovered under various modes of medical treatment (and hence) considering my life in peril I appoint" (literally "make") "my wife Srimati Bhubunessari Dabee to the *malikatwa* (ownership) after my demise as exercised" (literally "done") "by myself in respect of the family dwelling house (consisting of) two cottahs and six chittaks of land with building purchased in the name of my father Nilmoni Bhadury Mahashaye, deceased, at Sutanutygram, in the town of Calcutta, and wearing apparel, utensils, &c. Whatever there is (*i.e.*) in respect of all the properties aforesaid I, of my own free will, make (this) will. Finis 1269 date 20th Joisto.

Sree Krishna Lall Bhadury of Sutanati.

Sri Raj Krishna Biswas.
Sri Bhutnath Sastrie, &c.
Witness:—"

[46] The defendant further stated that the will was duly registered in the office of the Sub-Divisional Officer of Serampore; that upon the death of Kristo Lall Bhadury, his widow Bhubunessari Dabee took possession of his estate, not as his heiress under the Hindu law, but under the provisions of the will, and that she received the money paid to her by Government for the premises No. 41, Kally Prosad Dutt's Street, as owner thereof; that while proceedings under the Land Acquisition Act were pending in connection with the acquirement of the permises No. 41, Kally Prosad Dutt's Street, and before the payment of the money therefor to Bhubunessari Dabee, the plaintiffs gave notice of objection to the Collector of Calcutta by letter, but subsequently withdrew their objection by another letter; and the defendant further alleged that the properties which Bhubunessari Dabee died possessed of were her own property to which the plaintiffs were in no way entitled; that his father Prosonno Coomar Chuckerbutty, who was the uterine brother of Bhubunessari Dabee, died in Assar 1303 B.C., leaving him surviving the defendant, his sole heir and legal representative, and that he, the defendant, was the legal heir of Bhubunessari Dabee and entitled to all the property left by her.

Mr. *Mitter*, and Mr. *Chakravarti*, for the plaintiffs.

Mr. *Dunne*, Mr. *A. Chowdhry*, and Mr. *Dutt*, for the defendant.

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Mr. *Chakravarti.*—The words of the will do not convey to the widow more than an estate for life. The will does not give her a heritable estate or any power of alienation. Were it otherwise she would take as a purchaser and her position would be different from that of a widow. In the case of *Harilal Pranlal* v. *Bai Rewa* (1) the words used by the testator were "just as I am the owner of the property at present, in the same way after my death my wife again is the owner," and it was held that she took only a life-interest in the property. Among Hindus on marriage the lady passes out of her father's family and becomes a member of her husband's family. She acquires the *gotra* of her husband. There is a deep rooted principle among Hindus that property belonging to the family should never be allowed to go out of the family. See also *Lallu* v. *Jagmohan* (2). In [47] the case of *Hirabai* v. *Lakshmibai* (3), a number of Bengal decisions were considered, and it was stated by Sargent, C. J., in his judgment that the rule must be taken as well established, that in the absence of express words showing such an intention, a devise to a wife did not confer an estate of inheritance, but carries only a widow's estate as understood by Hindu law." *Koonjbehari Dhur* v. *Premchand Dutt* (4). In *Punchoomoney Dossee* v. *Troylucko Mohiney Dossee* (5) the testator by his will appointed his wife *malik* of his property and gave his permission to adopt a son, who on attaining age would become *malik*, and it was held that the use of the word *malik* did not necessarily mean that she should take an absolute estate. A gift to a daughter as *malik* would be on a different footing, as in the case of *Lala Ramjewan Lal* v. *Dal Koer* (6). A Hindu husband is never incompetent to create in favour of his wife an absolute interest in immoveable property bequeathed by him to her, though it is necessary, in order to create such interest, to use express language to that effect. *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (7); *Mathura Das* v. *Bhikhan Mal* (8).

Mr. *Chowdhry contra.*—The words *malik* and *malikatwa* mean "absolute owner" and "absolute ownership," unless there are expressions in the document in which the words are used limiting their meaning. In the cases cited on behalf of the plaintiff there are expressions in the will by which the testator contemplated the creation of subsequent interests, and it was owing to the existence of these subsequent interests that it was held in many of those cases that the meaning of the word *malik* would be so limited by the context as to mean only a life-interest. In the present case there are no expressions in the will limiting the ordinary meaning of the word *malik*, so it must be taken that the testator intended to give his widow an absolute and heritable estate in his property. In a recent case decided by the Judicial Committee it was held that in a Hindu will a heritable and alienable estate is to be understood [48] by the use of the words "shall become *malik*" unless the context indicates a different intention. *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (9).

JUDGMENT.

STANLEY, J.—The main question in this case is, whether under the will of Kristo Lall Bhadury, his widow Bhubunessari Dabee took an absolute interest in his immoveable property or merely the ordinary estate of a Hindu widow.

(1) 21 B. 376. (2) 22 B. 409. (3) 11 B. 573.
(4) 5 C. 684. (5) 10 C. 342. (6) 24 C. 406.
(7) 24 C. 646. (8) 19 A. 16. (9) 24 C. 834=24 I.A. 76.

Kristo Lall Bhadury died many years ago, leaving an only widow, but no issue surviving. He made a will in Bengali, dated the 2nd of June 1862, of which the translation is as follows. (reads will: see 27 C., page 45).

After the testator's death his widow took possession of his property and remained in possession of it until her death on the 17th of January 1898. She died intestate leaving the defendant Ashutosh Chuckerbutty her sole heir. The plaintiffs are grandsons of Roodnarain Bhadury, who was brother of Joynarain Bhadury, the grandfather of the testator Kristo Lall Bhadury, and as such are the reversionary heirs of Kristo Lall Bhadury. They contended that under the will of Kristo Lall Bhadury Bhubunessari Dabee only took the ordinary estate of a Hindu widow in his immoveable property, and that upon her death they became entitled to this property as reversionary heirs.

The testator having died prior to to the passing of the Hindu Wills Act, which incorporates s. 82 of the Indian Succession Act, the construction of his will is not affected by these enactments.

The rule as to the construction of the will of a Hindu is thus stated by their Lordships of the Privy Council in *Soorjeemoney Dossee* v. *Denobundoo Mullick* (1). "The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's **[49]** wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances, no doubt, must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its disposition is to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

Again in the case of *Mahomed Shumsool Hooder* v. *Shewukram* (2) their Lordships oberved: "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate."

It is a well settled rule of construction that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. Here there is no expression of intention discoverable in the will to control or qualify the dispositive words; consequently the plaintiffs are compelled to rely upon the view affirmed by their Lordships of the Privy Council that in construing a will one of the circumstances to be regarded is "the law of the country in which the will is made, and its dispositions are to be carried out," and that "in construing the will of a Hindu it is not improper to take into consideration

(1) 6 M I. A. 526 (550). (2) 14 B. L. R. 226 (231, 232)=2 I. A. 7 (14).

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what are known to be the ordinary notions and wishes of Hindus with regard to devolution of property." The plaintiffs also relied upon the language used by the testator in a *mukhtearnamah* executed by him on the 23rd of June 1862 for the purpose of having his will registered as showing that the property was given to his widow for the purpose of its preservation only. In this [50] document the following passage occurs: "Owing to ill-health * * * I have made a will in favour of my wife Srimati Bhubunessari Dabee for the *preservation* of my said house, &c., in Calcutta." I shall presently refer to this document.

Counsel for the plaintiffs has strongly relied upon the case of *Harilal Pranlal* v. *Bai Rewa* (1). In that case one Pranlal by his will directed that after his death his wife Ujam should take possession of and enjoy his property as owner. Then after making certain provisions for his daughters he again directed his wife to take possession after his death and added: "Just as I am the owner of the property at present in the same way after my death my wife Ujam is the owner." It was held by Farran, C. J., and Strachev, J., that the widow took only a life-interest in the property. After referring to the scheme of the will Farran, C. J., in delivering judgment, adds: "His (the testator's) main objects appear to be the protection of his property and the maintenance of his wife and children. His wife is to take possession of and enjoy the property, but he adds to this no words of inheritance, nor does he directly give her any power of disposition over it. The Courts have always leaned against such a construction of the will of a Hindu testator as would give to his widow unqualified control over his property. By the use of such expression as 'my wife is the owner after me' or 'my wife is the heir,' it is usually understood that the testator is providing for the succession during the lifetime of the widow and not altering the line of inheritance after her death. In the present case the testator is no doubt very emphatic in his declarations that his wife is to be the owner after his death, in one passage stating that just as he is the owner so she is to be the owner. The phrase is however ambiguous. It may mean that he intended emphatically to protect her peaceable possession and management during her lifetime against the claims of the husbands of his daughters and their own, or it may be intended to confer as full ownership and power over the property as he had." It is unfortunate that only extracts from the will appear in the report of this case. The intention of a testator is to be gathered from a perusal of the entire instrument and not from passages here and there. From the judgment [51] however it would appear that the main objects of the testator were apparent, and that they were the protection of his property and the maintenance of his wife and children.

In *Punchoomoney Dassee* v. *Troylucko Mohiney Dossee* (2), one Narain Dutt had two wives, one of whom died in his life-time, leaving a daughter, the plaintiff, and Kristo Kaminey Dossee, the mother of the defendant, who survived him. Narain Dutt made a will, the material portion of which ran as follows: "Whatever I have of immoveable and moveable property and ready money anywhere my wife Srimati Kristo Kaminey Dossee is the *malik* or proprietress thereof. She will deal with my debts and dues agreeably to the particulars below; she will pay whatever debts exist and recover and receive whatever dues there are receivable, and I have given commandment (permission) to my wife she will adopt a son; when the adopted son attains his age he will become the *malik* or proprietor of the

(1) 21 B. 376. (2) 10 C. 342.

whole of my property and will perform the *shrad* and *tarpan* of my father and father's father, and in the event of any good or evil befalling the said adopted son, in that case she will again adopt a son." It was held by Sir Richard Garth, C.J., and Cunningham, J., overruling the decision of Wilkinson, J., that the use of the word *malik* as applied to the widow did not necessarily mean that she should take an absolute estate, and that the directions in the will for the adoption of a son indicated an intention that the widow was only to take a limited estate.

In the earlier case of *Koonjbehari Dhur* v. *Premchand Dut* (1), there was also internal evidence in the will itself that the testator did not intend to give his wife an absolute estate in his immoveable property. No doubt, however, the learned Judges, Jackson and Tottenham, JJ., did in their judgment lay down the wide proposition that a Hindu wife takes by the will of her husband no more absolute right over the property bequeathed than she would take over such property, if conferred upon her by gift during the lifetime of her husband, and whether in respect of a gift or a will it is necessary for the husband to give her in express terms a heritable right or power of alienation. The Court, however, did not rest its judgment upon the rule so stated, but rather upon the finding that there was internal evidence in [52] the will of the testator's intention that the property should not pass to the widow absolutely.

In the case of *Bhobo Tarini Debya* v. *Pyari Lall Sanyal* (2), a clause in a will of a Hindu testator ran thus: "My first and second wives shall together be entitled to twelve annas of all the properties left by me and Doorga Nath Chuckerbutty and Rajoni Nath Chuckerbutty, sons of my father's sister's son Radha Nath Chuckerbutty, deceased, who have been living in commensality from the time of my predecessor, shall be entitled to a four annas share in equal shares according to the following rules." Then followed the rules, but according to the judgment there was nothing in the will either in what followed or in what preceded expressly stating that the widows were to take an absolute estate. It was held by Banerjee and Rampini, JJ., that the will only gave the widows a restricted interest. In the course of their judgment after reading the terms of the gift the learned Judges say: "If this stood alone and s. 82 of the Indian Succession Act was not applicable to the case, then as the bequest (which in this respect follows the same rule as a gift) was one of immoveable property by the husband to his wives, they would take a limited estate under the Dayabhaga. They would take the property without having any power to alienate it; and property over which they have not the power of alienation cannot constitute their *stridhana* or absolute property (see Dayabhaga, Chap. IV, ss. 1, 18, 19 and 23), and must on their death pass to the heirs of their husband—(see Colebrooke's Digest, Book V, 515, Commentary)." The learned Judges in that case found that it amply appeared from the will that only a restricted interest was intended to be created in favour of the widow.

There is nothing in the will which is now the subject of consideration, either in what precedes or in what follows the gift to his wife, which throws much, if any, light upon the meaning of the language used by the testator. It becomes necessary, therefore, to determine what is the legal effect of the appointment by a Hindu testator of his wife to the *malikatwa* (ownership) of his immoveable property. The words are "I appoint (literally, 'make') my wife Srimati Bhubunessari Dabee to the *malikatwa*

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(1) 5 C. 684. (2) 24 C. 646.

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(ownership) after my demise as exercised [53] (literally 'done') by myself, in respect of the family dwelling-house, wearing apparel, utensils, &c., whatever there is, that is in respect of all the properties aforesaid, I of my own free will make (this) will." Did this gift confer upon the testator's widow an absolute estate heritable and alienable in his immoveable property, or merely the limited estate of a Hindu widow?

In the case of *Mahomed Shumsool Hooder* v. *Shewukram* (1) a Hindu by a petition to the Collector of Patna recited the deaths of his son, of his brother, without leaving issue, of his brother's wife and his own wife and then proceeded to dispose as if by testament of his property as follows: "Only Mussamut Rani Dhun Kowar, widow of Roy Kalika Pershad, my deceased son, above mentioned, who, too, excepting her two daughters born of her womb Mussamut Bibi Sitatoo and Bibi Dulari, has no other heirs, is my heir. Except Mussamut Rani Dhun Kowar aforesaid none other is nor shall be my heir and *malik*." Later on occur the words: "Furthermore to the said Mussamut Rani too these very two daughters named above together with their children, who after their marriage may be given in blessing to them by God Almighty, are and shall be heir and *malik*." Sir Robert Collier, in delivering the judgment of their Lordships of the Privy Council, says that the expressions in which the gift is made to Mussamut Rani Dhun Kowar if they stood alone would in their Lordships' opinion show that the testator intended to make an absolute gift to Rani Dhun Kowar; but that the latter expressions qualified the generality of the former, and that the will taken as a whole must be construed as intimating the intention of the testator that Rani Dhun Kowar should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. The gift in this case, it is to be observed, was made not to the testator's widow but the widow of his son.

In *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (2) Lord Davey, in delivering the judgment of the Privy Council, states as follows: "The words 'became *malik*' of all my estates and properties would, unless the contest indicated a different meaning, be sufficient for that purpose (*i.e.*, to confer an heritable and alienable estate) even without the words "enjoy with son, grandson [54] and so on, in succession," which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying a heritable and alienable estate. The gift in this case was not to the testator's widow but to his sister's son.

In *Lala Ramjewan Lal* v. *Dal Koer* (3), in which a testator provided (*inter alia*) by his will that his daughters and brother's daughters "shall be *maliks*, and come in possession in equal shares of all the moveable and immoveable properties." Trevelyan and Beverley, JJ., say "*prima facie* there can be no question, but that a gift where there are no controlling words is an absolute gift and the expression *maliks* used here would ordinarily imply an absolute gift. But it is contended that we must introduce into this will what is said to be the prevalent Hindu idea, that a female ought not to obtain anything beyond an estate for her lifetime, and therefore, although the word *maliks* is used, we must cut down the estate to the extent of an estate given to a Hindu daughter. There is no authority for such a proposition. The words are absolute, and if they stood by themselves without anything to the contrary it would be impossible for us to say that they did not give an absolute estate."

(1) 14 B.L.R. 226=2 I. A. 7. (2) 24 C. 834 (849). (3) 24 C. 406.

This decision is in consonance with the earlier decision of Glover and Mitter, JJ., in the case of *Kollany Koer* v. *Luchmee Pershad* (1), in which the effect of the language used by a Hindu in a petition whereby he directed that after his death his widow and daughter should be "*malik,*" and his entire estate, real and personal, should devolve upon them was considered. It was held that it was plain that the testator intended to make an absolute gift, and that where it was plain, as far as the words of a will went, that the testator intended to make an absolute gift of his property in favour of his widow and daughter the gift must be construed as absolute, unless it could be shown that by the Hindu law a gift to a female meant a limited gift.

Where a Hindu husband gives immoveable property to his wife with express power of alienation, or where the giving of such power is implied by the terms of the gift, she will acquire an absolute estate in the property. Words of limitation, such [55] as are ordinarily used to convey an estate of inheritance, are not necessary. The intention of the husband may be expressed in other ways and is a matter of construction. *Ram Narain Sing* v. *Peary Bhugut* (2).

Their Lordships of the Privy Council in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (3) above referred to, at p. 849 of the report, state that the words "become owner (*malik*) of all my estate and properties" would, unless the context indicated a different meaning, be sufficient for the purpose of conferring a heritable and alienable estate.

I find nothing in the will before me to qualify or control the language in which the gift to the testator's wife is expressed. The testator appoints his wife "to the *malikatwa*, as exercised by myself in respect of the family dwelling house." The words "as exercised by myself," so far from limiting the gift, seem to me rather to extend it and to indicate an intention on the part of the testator to confer on his wife the same absolute rights of ownership as he himself enjoyed. The intention of the testator was, I think, to give his wife an absolute heritable and alienable estate. If this were not his intention it is remarkable that no reference whatever is made in his will by the testator to any other object of his bounty or of his regard. He was childless and the plaintiffs were but distantly related to him. There was no great object indeed in his making the will if his widow was only to obtain under it the same limited estate, which she would have enjoyed in the event of his dying intestate. It is observable that the gift of the immoveable property is a combined gift. This tends, I think, to show that the testator intended his widow to have the same absolute interest in the realty as under the gift she would take in the moveable property.

Upon the whole I see no sufficient reason in this case for attaching a restricted meaning to the expressive words used by the testator in the disposal of his property.

I was pressed by counsel for the plaintiffs with this further consideration. For the purpose of having his will registered the testator executed a power-of-attorney (*muktearnamah*) on the [56] 23rd of June 1862, in which is the following recital: "I have made a will in favour of my wife Srimati Bhubunessari Dabee for the preservation of my said house, &c., in Calcutta."

It is contended that the object of the testator being expressed in this instrument to be the preservation of his house an absolute gift was not

(1) 24 W. R. 395. (2) 9 C. 830. (3) 24 C. 834.

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intended to be made by the will. Even if this document is admissible in evidence to explain or control the language of the will there is nothing in the use of the words "preservation of his house," so far as I can see, which helps the plaintiffs' contention. The question, for whom was the house to be preserved, would still remain. Was it to be preserved for the widow and her heirs, or for the widow and after her the reversionary heirs of the testator? It is too vague and general an expression to be relied on one way or the other.

Having regard to the view which I have formed as to the true construction of the testator's will, it becomes unnecessary for me to determine the remaining issues raised in the case. It may, however, be well for me to state that, in my opinion, the house and premises, known as Shampooker House in Calcutta, were purchased with the proceeds of the sale of the testator's house No. 41, Kally Prosad Dutt's Lane, and so formed part of his estate. Further that the evidence has not satisfied me that the plaintiffs ever released their claim to the immoveable property of Kristo Lall Bhadury as alleged by the defendant.

I shall declare that upon the true construction of the will of Kristo Lall Bhadury, his widow became absolutely entitled to his immoveable property, and dismiss the action with costs.

D. S.

Attorneys for the plaintiffs: Messrs *U. C. Dutt & Son.*

Attorney for the defendant: Babu *P. N. Sen.*

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27 C. 57.

[57] APPEAL FROM ORIGINAL CIVIL.

Berfore Sir Francis W. Maclean, Kt., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Ameer Ali.

MOTI CHAND AND ANOTHER (*Plaintiffs*) *v.* FUL CHAND AND ANOTHER (*Defendants*).* [12th December, 1898.]

Practice—Filing paper books for appeal—Application for enlargement of time to file paper book—Subsequent application at the hearing of the appeal to file paper book then ready—Discretion of Court—Sufficient cause—High Court Rules, Appellate Side, chap. 7, *Rule* 11.

An extension of time for filing paper books in an appeal will not be granted unless "sufficient grounds" be shown for granting the application.

Where the appellants waited from the 13th August 1898, the date of filing their memorandum of appeal, till the 22nd September 1898, before applying for office copies of the necessary papers to enable them to prepare their paper book, and an application was made by the appellants on the 12th December 1898, for two months further time to file their paper book, the delay between the 13th August and the 2nd September 1898 being unexplained, *Held* that no sufficient cause had been shown for extension of time, nor was the case altered by the fact that the paper books were ready when a subsequent application was made on the appeal being called on for hearing, and an application for leave to file them was consequently dismissed.

THE appellants filed their memorandum of appeal in this suit on the 13th August 1898. On the 22nd September 1898 they applied and paid stamps for office copies of the exhibits, depositions, and judgment, in the suit, but owing to the offices of the Court closing soon afterwards the

* Original Civil Appeal No. 25 of 1898 in Suit No. 135 of 1898.

appellants received copies of the judgment and depositions for the purpose of preparing their paper book on the 5th and 6th December 1898, but had not received office copies of the exhibits. On the 12th December the appellants applied to the appellate Court that two months further time be allowed them for filing their paper book. There was no explanation afforded by the appellants as to the delay between the 13th August and the 22nd September 1898.

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Mr. *Garth*, for the appellants.

Mr. *Pugh*, for the respondants.

[58] The judgment of the Court (MACLEAN, C. J., and HILL and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

MACLEAN, C. J.— I do not think that we ought to interfere in this case.

The appellants are admittedly out of time, and though no doubt we have a discretionary power—a power to be judicially exercised, upon judicial principles— under rule 11 of chap. 7 of the High Court Rules, appellate side, to enlarge the time, upon "sufficient cause" being shown, in the exercise of that discretion I do not see my way to acceding to the present application. The delay which occurred from the 13th August to the 22nd September is absolutely unexplained. So far from any sufficient cause having been shown for enlarging the time, no cause whatever has been shown. Why did the applicants wait from August 13th to September 22nd before applying for the office copies, and then only apply when the offices, if not actually closed, were on the eve of being closed for the vacation? This delay of nearly six weeks—three-fourths of the period allowed for delivering the paper book, is absolutely unexplained. Again, the applicants might have made the present application to the Judge sitting on the original side three weeks ago, *i. e.*, immediately the Courts resumed after the vacation. There is no explanation whatsoever of this further delay. Litigants must understand that the rules and orders of this Court are intended to be, and must be, complied with, and I regret as I have had occasion previously to observe the laxity, which has crept into the practice here on this head. Some litigants in these Courts would almost appear to be under the impression, as the result of that laxity, that they are entitled to have the time prescribed by the rules enlarged for the mere asking. I desire to dissipate any such idea. In exercising our discretion under the rule we are bound to regard, not only the view of the applicants but the rights which the respondents may have acquired by reason of the default of the other side. Though no rule fettering the exercise of our discretion should be laid down, the enlargement of time for doing anything after judgment ought to be more cautiously granted than before judgment. But be that as it may, each case must be considered according to its particular circumstances. Litigation in this **[59]** country is so protracted, and so much time is allowed to litigants to take the various steps, specially as regards appeals, that I am not disposed to extend such time, unless sufficient grounds be shown. The application must be refused with costs.

Office copies of the exhibits mentioned in the above application were received by the attorneys for the appellants on the 19th December 1898, and on the same day the attorneys instructed their printer to print their paper book as quickly as possible, and a copy of the paper book ready for binding was sent to the attorneys' office on the 29th December 1898,

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whereupon the said attorneys wrote to the attorneys for the respondents stating that they had received from the printer their paper book ready for binding and offered the same for comparison. On the 31st December 1898, the attorneys for the appellants received their paper books and sent three copies of them to the attorneys for the respondents, who received and retained them. On the 4th January 1899 upon the appeal being called on the appellants applied to the Court upon notice to the respondents for leave to file their paper book.

Mr. *Garth*, for the appellants.

Mr. *Pugh*, for the respondents.

The judgment of the Court (MACLEAN, C. J., PRINSEP and AMEER ALI, JJ., concurring) was as follows :—

JUDGMENT.

MACLEAN, C. J.—This application is in effect the same as that which was made to us, and which we refused on the 12th December last; and we should, I think, be stultifying ourselves if we were now to accede to it. It is an ingenious attempt to obtain indirectly the same benefit as would have accrued to the applicant, if we had granted the previous application, and, as I pointed out during the argument, to obtain an advantage as against the respondents, from the accident of the case before it on the list having occupied many days in argument. But apart from any such consideration, if the present application had been the first and not the second and had been *res integra*, the applicants would still have been face to face with the difficulty that they are unable to show any sufficient grounds which in the exercise of our discretion would warrant us in acceding to the application. No doubt, we may, under the concluding paragraph of rule 11 of chap. [60] 7 of the appellate Rules exempt the applicant, "upon sufficient grounds verified by affidavit," from the operation of the rules, but no grounds have even been suggested to us. I have heard none; the only thing suggested is that the paper book is now ready. That is not sufficient, when the paper book ought to have been filed some time ago, and there is no explanation of the delay. If we were to accede to this application we should be depriving the respondents of the vested interest they have acquired in their judgment and depriving them of that interest without any sufficient ground being shown for so doing. In my opinion we ought not to interfere in cases of this class save under special circumstances and none have been shown in the present case. The application must be dismissed with costs (1).

[61] Attorneys for the appellants : Messrs. *Leslie & Sons*.

Attorneys for the respondents : Messrs. *Farr & Pugh*.

D. S.

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27 C. 60 N.

(1) In another case *Gopal Chunder Das* v. *Radhabullubh Das* and *Bholanath Das*, Original Civil Appeal No. 24 of 1898, in Suit No. 456 of 1896, a similar application was similarly decided on the 17th January 1899.

Mr. *Pugh*, for the appellants.

Mr. *Bonnerjee*, for the respondents.

The following judgments were delivered by the Court (MACLEAN, C. J., and PRINSEP and HILL, JJ.) :—

JUDGMENTS.

MACLEAN, C.J. (PRINSEP and HILL, JJ, concurring).—This is an application on the part of Lakhimani Dasi, and her infant children, the defendants in the suit, for an extension of time for filing their paper books on the appeal. They ask for two

27 C. 61=4 C.W.N. 92.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

SHAMA SUNDRAM IYER (*Plaintiff*) v. ABDUL LATIF AND OTHERS (*Defendants*).* [18th August, 1899.]

Arbitration—Code of Civil Procedure (Act XIV of 1882), ss. 506 and 578—Reference to arbitration, not by a written petition, but by consent of parties—Whether an award passed on such reference ab initio void—Irregularity not affecting the merits of the case or the jurisdiction of the Court.

The second paragraph of s. 506 of the Civil Procedure Code, which says that every application for an order of reference shall be made in writing [62] is directory only; therefore in a case where both parties consented to a reference to arbitration and where the order of reference was made by the Court in the presence of their counsel or advocates, but not upon a written application, such a reference is not a nullity, as it is merely an irregularity not affecting the merits of the case or the jurisdiction of the Court.

[F., 4 A.L.J. 691=27 A.W.N. 273; Appr., 4 P.R. 1907=20 P.W.R. 1907; R., 9 Ind. Cas. 412 (413); 5 O.C. 13 (16).]

THE facts of the case are shortly these : The plaintiff brought a suit in the Court of the Recorder of Rangoon against defendant for recovery of possession of a strip of land. The defence was that the land belonged to the defendants and that the plaintiff in fact encroached upon their land. On the 25th August 1897, the Recorder, on the application of both the parties through their counsel or advocates, made the following order :

months further time. The dates are as follows: A decree adverse to the present applicant was made on the 6th of May 1898, and on the 6th of August 1898, the appeal was filed by her, jointly with one Gopal Chunder Das, and the time for delivery of paper books, under rule 8 of chap. VII of the Rules and Orders of the High Court, would be two months from the date of filing the appeal. Nothing, however, was done until the 18th November 1898, when an application was made to Mr. Justice Sale for an extension of time. Mr. Justice Sale refused that particular application, but gave the applicants an opportunity of adducing further evidence, which I assume was done. At any rate, on the 28th of November 1899, Mr. Justice Sale made an order extending the time for filing the paper books until the first day after the Christmas vacation, which would be the 3rd of January of this year. Upon that day, an application was made on behalf of the present applicant to be allowed to proceed with the appeal *in forma pauperis*. That application was noted, but not heard, and on the 9th instant, the application to proceed *in forma pauperis* was withdrawn, and the present application for extension of time was substituted. The question we have to consider is whether any sufficient cause has been shown, within the meaning of the rule, which will warrant us in granting the extension asked. I think no sufficient cause has been shown. The ground suggested is, that the applicants left everything to Gopal Chunder Das, and that Gopal Chander Das did nothing. This is not sufficient. The delay from the 6th of August 1898 until virtually the 9th January instant, is wholly unexplained.

In saying this I am not unmindful of the suggestion—for it is little more—that they were trying to get money with which to prosecute the appeal. In the exercise of the judicial discretion which is vested in us I see no grounds for granting the application, which must be dismissed with costs. The appeal must under the circumstances be dismissed with costs.

Attorney for the appellants : Mr. *Rose.*

Attorneys for some of the respondents : Messrs. *G. C. Chunder & Co.*

Attorneys for the remaining respondents : Messrs. *Swinhoe & Co.*

[This case is also followed in 27 C. 57 (60)—Ed.].

D. S.

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* Appeal from Original Decree No. 130 of 1898, against the decree of W.F. Agnew, Esq., Recorder of Rangoon, dated the 16th September 1897.

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"By consent let the case be referred to Mr. A. V. DeSouza as arbitrator. Award to be returned in a week." Before the award was made an application by petition was filed by the plaintiff to the Court for an extension of time for the arbitrator to make his award. This application was granted, and the arbitrator on the 7th September 1897 made his award which was in the favour of the defendants.

On the 15th September 1897, the plaintiff filed a petition impugning the award, and on the next day the Recorder gave judgment confirming it, and a decree was made upon the footing of the award.

Against this decision the plaintiff appealed to the High Court.

Babu *Sharat Chandra Roy Chowdhry*, for the appellant.

Moulvi *Mahomed Habibullah*, for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C. J.—In this case the plaintiff instituted a suit in the Court of the Recorder of Rangoon against the defendant claiming that he was entitled to a piece of land some 50ft. by 40ft. in respect of which the plaintiff alleged that the defendant was obstructing him in building upon it. The real contest was as to a narrow strip some 2ft. by 40ft. The defendant said that the plaintiff was not entitled to this strip; that it belonged to the defendant; and that the plaintiff was in fact encroaching upon the defendants' land. It will thus be seen that the question was substantially one of boundaries. The matter came before the Recorder, and on the 25th of August 1897, the Recorder, upon the application of [63] the plaintiff and the defendant, made through counsel or advocates, the following order: "By consent let the case be referred to Mr. A. V. DeSouza as arbitrator. Award to be returned in a week." It is not very clear how far the arbitration had proceeded, but apparently nothing much had been done before an application by petition to the Court was made by the plaintiff for an extension of time for the arbitrator to make his award. This application was granted; the matter was gone into before the arbitrator, and the arbitrator duly made his award, dated the 7th September 1897, which was adverse to the plaintiff. The plaintiff then filed a petition before the Recorder on the 15th September 1897, impugning the award, and on the 16th September 1897 the Recorder gave judgment confirming it, and a decree was made upon the footing of the award.

Then comes the present appeal to this Court, and for the first time we are told by the appellant that inasmuch as the original application to refer the case to arbitration was not made in writing, the arbitration proceedings, the award and the decree of the Recorder are each and all invalid. The objection is a technical one and it is not for us to say whether this is a very straightforward method of conducting litigation; the plaintiff is entitled to raise the point, and we can only decide whether or not it is well founded.

The question depends upon whether or not the second paragraph of s. 506 of the Code of Civil Procedure, which says that every application for an order of reference shall be in writing, is directory only. or whether the Court has no jurisdiction to make such an order unless and until the application is so made. It is, perhaps, doubtful whether the point really arises, seeing that the application of the plaintiff for further time was undoubtedly in writing, and whether that application might not, under the circumstances of this case, be treated as tantamount to a compliance with

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the requirements of the section. The object of having the application made in writing is, one would surmise, to avoid subsequent controversy as to whether or not there was any such application; but that there was such an application in this case is not disputed.

We have been referred to two or three cases and especially to the case of *Nusserwanjee Pestonjee* v. *Mynoodeen Khan* (1). That **[64]** case was decided upon the principle that if the Court has not jurisdiction to deal with a matter, the parties by consent, cannot give such jurisdiction—a proposition I have no desire to impugn. And there it was held that the Court had no jurisdiction except upon the fulfilment of the requirements of a certain Regulation; that these requirements were not directory only; and that as they had not been complied with, the jurisdiction did not arise. The cases of *Gazee* v. *Hameed Buksh* (2), and *Bhrigoo Roy* v. *Bhagruth Upadhya* (3) when examined have really no bearing upon the case before us.

In my opinion the jurisdiction is created by the first paragraph of s. 506, and the second paragraph is directory only, as to the form in which the application should be made. It is clear both parties consented to the reference, and that the order of reference was made by the Court in the presence of their counsel or advocates, and if the section be, as I think, directory only, there has only been an irregularity not affecting the merits or the jurisdiction, and the case falls within s. 578 of the Code of Civil Procedure.

There is no evidence that the application was not in writing, but as no such application is recorded, we must take it that no such application was made.

As to the second point, *viz.*, whether we can go into the merits, inasmuch as the award was confirmed by a decree of the Recorder's Court, no appeal lies from that decree under s. 522 of the Code.

I would add for the guidance of the lower Courts in dealing with applications under s. 506 of the Code that to avoid contests of the present description, the Judges in those Courts should be careful to see that such applications are made in writing.

The appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion.

The appeal in this case is against the decree made by the Recorder of Rangoon, in accordance with an award made by an arbitrator, to whom the case was referred for determination. That being so, s. 522 of the Code of Civil Procedure bars an appeal, unless it can be shown that for some reason or **[65]** other, the award itself was a nullity—See *Joy Prokash Lall* v. *Sheo Golam Singh* (4).

The way in which the learned Vakil for the appellant seeks to make out this position is by centending that as s. 506 of the Code of Civil Procedure requires that an application for reference to arbitration shall be in writing, and as the application for reference to arbitration in this case was not made in writing, the reference to arbitration was void *ab initio*, and if the reference to arbitration were void, the award made by the arbitrator must be treated as a nullity.

It is quite true that s. 506 of the Code enacts that every application for reference to arbitration shall be in writing, but does it follow, where

(1) 6 M. I A. 134.
(2) 16 W. R. 160.
(3) (1864) Gap. No. W. R. 41.
(4) 11 C. 37.

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a reference is made by an application not in writing, that the arbitration award that is made upon such reference is a nullity?

In order that there may be a valid reference to arbitration the essential conditions required by law are, that the parties, or their pleaders duly authorised, shall apply to the Court, at any time before judgment is pronounced, that the matters in difference between them in the suit be referred to arbitration. There is no question here that these conditions were satisfied; no objection is taken to the authority of the pleaders, or advocates, of the parties who made the application; the only objection raised is that the application to the Court for referring the case to arbitration was not made in writing.

Then the law further provides that the application for referring the case to arbitration shall be in writing. But that in my opinion touches only the form of the application, the mode in which it is to be made, and if that provision of the law is not complied with, though the other provisions of the law have been, the defect, in my opinion, would be an irreguarlity only such as would be cured by s. 578 of the Code of Civil Procedure. It was contended by the learned Vakil for the appellant that the omission in this case to make the application in writing was not a mere irregularity, but was a matter that affected the jurisdiction of the Court to refer the case to arbitration; for he contended that the Court acquired jurisdiction to refer a case to arbitration only upon an application being made to it in writing and not otherwise. I do not consider this contention sound. The Court [66] acquired jurisdiction to refer the case to arbitration upon an application being made to it by the parties, or their duly authorised pleaders or advocates. That was done in this case, and the only defect in the application was that the manner of applying was not in strict conformity with the law; that is to say, instead of the application being in writing, it was a verbal application. That, as I have already said above, affects only the form of the application, and nothing more. It was, therefore, a mere irregularity, which could not be said to have affected the jurisdiction of the Court.

I may add that in this case, an application in writing was made by the learned Counsel for the plaintiff on the 31st of August 1897, stating that the arbitrator was ordered to file his award on the 1st of September 1897; that the arbitrator could not do so, as the witnesses for the plaintiff had not yet been examined; and that both parties had agreed to an extension of time being granted; and accordingly, the Court extended the time for filing the award to the 8th September 1897, and the award was filed on the 7th September. So that it may well be said that even if there was a defect in the manner in which the original application for reference to arbitration was made, that defect was cured by this written application, in accordance with which the witnesses for the plaintiff were examined, nothing apparently having been done before the making of this written application on behalf of the plaintiff.

In regard to the cases cited by the learned Vakil for the appellant in support of his argument, which are all distinguishable from the present, I need only make one observation, in addition to what has been said by the learned Chief Justice in his judgment, namely, that in the case of *Nusserwanjee Pestonjee* v. *Mynoodeen Khan* (1), the submission to arbitration was a private one and not one made in the course of any suit,

(1) 6 M.I.A. 134.

and the defects in the submission could not, therefore, be cured by any principle of law similar to that embodied in s. 578 of the present Code of Civil Procedure. In my opinion, therefore, the contention of the appellant is not made out, and the appeal must, therefore, be dismissed with costs.

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S. C. G. *Appeal dismissed.*

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27 C. 67 (F.B.)=4 C.W.N. 3.

[67] FULL BENCH.

Before Mr. Justice Prinsep, Mr. Justice Macpherson, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Stevens.

BASANTA KUMARI DEBYA AND OTHERS (*Defendants*) v. ASHUTOSH CHUCKERBUTTI AND OTHERS (*Plaintiffs*).* [7th August, 1899.]

Landlord and tenant—Suit by a landlord against a tenant for a certain sum payable by him out of the rent to a third person by assignment—Whether such a suit is one for rent or for damages.

Held (by the FULL BENCH) that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment, is one for rent and not for damages.

Rutnessur Biswas v. *Hurish Chunder Bose* (1) referred to. *Mohabut Ali* v. *Mahomed Faizullah* (2), approved of.

[F., 14 C.L.J. 589 (595)=10 Ind. Cas. 406; R., 16 C.L.J. 89 (90)=10 Ind. Cas. 382; 15 Ind. Cas. 301 (303); 19 Ind. Cas. 752 (753); D., 32 C. 169 (174)=9 C.W.N. 96.]

THIS case was referred to a Full Bench by BANERJEE and RAMPINI, JJ., on the 5th January 1899, with the following opinion:—

This appeal arises out of a suit brought by the plaintiffs, respondents, to recover a sum of Rs. 185-8 annas, on the allegation that the defendants own a *jama* or tenure under the plaintiffs at an annual rent of Rs. 621; that out of this sum, a sum of Rs. 494 is, under an assignment by the plaintiffs, payable by the defendants to the superior landlords; that out of the amount of rent due to the said *maliks*, the defendants have not paid the sum of Rs. 146-8 annas from 1298 to 1301, nor are they required to pay the same to the said *maliks*, and that the plaintiffs are entitled to recover as damages from the defendants the said sum with interest amounting in all to Rs. 185-8 annas.

There were various defences raised to this action which it is not necessary to go into in detail now. In substance the defence was a denial of liability.

The first Court decreed the plaintiffs' claim in part. On appeal by the defendants the decree of the first Court was affirmed.

[68] The defendants have now preferred this second appeal, and at the hearing of the second appeal, a preliminary objection is raised on behalf of the plaintiffs, respondents, that no second appeal lies in this case, the suit being not one for rent, but one of the Small Cause Court class, and for an amount not exceeding Rs. 500.

In support of the preliminary objection the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (1) is relied upon. In answer to the preliminary objection, the learned Vakil for the appellants contends that the suit

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* Reference to a Full Bench in Appeal from Appellate Decree No. 218 of 1897.

(1) 11 C. 221. (2) 2 C.W.N. 455.

1899 AUG. 7. — FULL BENCH. 27 C. 67 (F.B.) = 4 C.W.N. 3.

is really one for rent, and, in support of his argument he relies upon the case of *Mohabut Ali* v. *Mohomed Faizullah* (1).

The terms of the lease which bear upon the question raised in the preliminary objection are as follows:—

"Accordingly agreeable to your application we, with the exception of (the land occupied by) the resident tenants, and the *khamar* lands in Atharokhada, grant you a *kaimi mourasi potta* in respect of the whole of the remaining properties, that is to say, a *kaimi mourasi potta* in respect of 87 bighas 13 cottas of land consisting of the *barati* (lands) of taluk Taraf Goalkhali, as per *hustbud*, and the whole of the *Khamar* lands, etc., thereof, and the lands of the *bundobusti* (settled) taluk Atharokhada, as well as other *jote jamas* comprised in plots, the boundaries whereof are given below, and also 72 bighas 10¾ cottas of *brohmutter* land, both making a total of 360 bighas and 3¾cottas of land, *mal* and *lakhiraj*, at a early *jama* of Rs. 621-1 anna 6 gundas 2 coras as mentioned in the *hustbud* papers, on receipt of a bonus of Rs. 800. Out of the said total amount of *jama* or rent, a sum of Rs. 100 should be allowed to you yearly on account of collection charges, after which the sum of Rs. 521-1 anna 6 gundas and 1 cora shall remain as the fixed amount of rent due to us. But we hereby make an assignment to you to pay a sum of Rs. 493-10 annas 1 gunda and 3 coras on account of *sudder* rent payable to us, and of the above amount. According to that assignment you shall pay the amounts of *sudder* rent mentioned in a separate *furd* or sheet to our *maliks* or landlords and into the Collectorate, and take *dakhilas*, challans and receipts, etc., in our names showing payments of *sudder* rent thus assigned over. After paying these amounts of *sudder* (rent) you shall pay to us Rs. 27-7 annas 4 gundas and 3 cowris in cash, according to *kists* or instalments. Upon your making out to us at the end of the year the *dakhilas* showing payments of *sudder* rent to the landlords, for which an assignment is made to you, we shall duly grant you a *dakhila* for the whole of the amount. Bound by these terms you from this day shall take possession **[69]** of the above *mehals* on the strength of this *mourasi potta* and continue to enjoy the profit, down to your sons, sons' sons, and so on in succession. Should you make default in paying the specified amounts of rent, you shall be dealt with according to law."

The question for determination that arises at the outset is whether the money for which this suit has been brought is rent or not. If it is rent, a second appeal will lie. If it is not rent, a second appeal is barred by s. 586 of the Code of Civil Procedure.

Upon this question, we think there is a clear conflict of decision in this Court, the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (2) supporting the respondent's contention while the case of *Mahabut Ali* v. *Mahomed Faizullah* (1) favours the opposite view.

With all respect to the learned Judges who decided this latter case, we feel bound to say that we are unable to distinguish that case from the earlier one. Nor are we able to distinguish the present case from either of those two cases in principle.

As there is a conflict of decisions in this Court upon the question whether when a landlord assigns a part of the rent payable to him towards the satisfaction of the rent due by him to his superior landlord or the satisfaction of a demand for revenue payable by him to the Collector, such sum continues or ceases to be "rent," the question must be referred to a

(1) 2 C.W.N. 455. (2) 11 C. 221.

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Full Bench; and as the question arises in a second appeal, the whole case must be so referred.

Babu *Saroda Churn Mitter*, for the appellants.

Babu *Surendra Chundra Sen*, for the respondents.

The following opinions were delivered by the Full Bench (PRINSEP, MACPHERSON, GHOSE, HILL and STEVENS, JJ.):—

OPINIONS.

PRINSEP, J.—In the lease under which the defendants held certain lands from plaintiffs, they agree to pay a certain amount of their rent to third persons. They have failed to do so. Hence the suit now before us on a reference from the Division Court before which the second appeal came on for hearing. Objection was taken before that Division Court that this is a [70] suit for damages for a sum less than 500 rupees, and that consequently a second appeal is barred by s. 586 of the Code of Civil Procedure. On the other hand, the defendants claimed the right of second appeal on the ground that this was a suit for arrears of rent. The Divisional Court has referred this case to a Full Bench in consequence of the cases of *Rutnessur Biswas* v. *Hurish Chunder Bose* (1) and *Mohabut Ali* v. *Mahomed Faizullah* (2), which, in the opinion of the learned Judges, were in conflict on this point, and we are asked to find "whether the money for which this suit has been brought is rent or not."

I was one of the Judges who decided the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (1), and I think that that case is distinguishable both from this case and the case of *Mohabut Ali* v. *Mahomed Faizullah* (2), with which it is stated to be in conflict. The report of the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* shows that the plaintiff and defendant were not landlord and tenant. The defendant was the tenant of the plaintiff's tenant, and, in the agreement with his landlord, he accepted the conditions under which his landlord undertook to make payments of the rent to third parties, and this was accepted by the superior landlord, the assignee. The present case is between landlord and tenant, and the matter in dispute is the non-payment of the rent due by the latter to a third party. This was money due to the plaintiff as rent. In the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (1) the money was payable to the defendant's landlord, and was payable under an assignment to a third party, who accepted the assignment and sued on it. Here in my opinion lies the difference in the two cases. The money claimed in the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (1) was never payable as rent by the defendant to Rutnessur as his tenant, but it was due under an assignment by the defendant's landlord which was accepted by Ryasona, the predecessor of Rutnessur, the document on which the suit was brought being the *kabuliat* executed by the defendant not in favour of the plaintiff or his predecessor Ryasona, but in favour of Ryasona's tenant. That this was so appears both from the statement of the case in the report which is not [71] carefully expressed and from the judgment itself. The report by the reporter states that the *darijara* lease granted to defendant by Ryasona's tenant was "confirmed" by Ryasona; that was a confirmation of the assignment made in the *kabuliat* granted by Ryasona's tenant to defendant. The suit was brought on this *kabuliat*. My memory of this case, to the judgment in which I was a party, is confirmed by the plaint to which I have referred,

(1) 11 C. 221. (2) 2 C.W.N. 455.

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which shows that over and above the moneys payable to Ryasona thus assigned there was also money payable by the defendant to his own landlord. The judgment, moreover, shows that the defendant was not regarded as the tenant of the plaintiff. The fact that a portion of this money was under the assignment payable to Ryasona's landlord is immaterial, for none of it was payable to Ryasona except under the assignment and the defendant was never Ryasona's tenant. I observe that in *Mohabut Ali* v. *Mohamed Faizullah* (1), a case admittedly on all fours with the present case, Ghose and Stevens, JJ., distinguished that case from the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (2).

The determination of the matter before us depends on the terms of the lease which are set out in the reference. Under that lease the tenant agreed to pay Rs. 521-1 anna 6 cowris 3 krants to the plaintiffs. But it was stipulated and agreed that out of this sum the tenant should pay Rs. 493-10 annas 1 cowri 1 krant to third parties who were the landlords of his landlord, and it was further provided that "after paying these amounts of *sudder* rent you (the tenant) shall pay us (the landlord) Rs. 27-7 annas 4 cowris 5 krants in cash according to instalments. Upon your making over to us at the end of the year the *dakhilas* showing payments of *sudder* rents to the landlords, for which an assignment is made to you we shall *only* grant to you a *dakhila* for the whole amount." The lease further declared that "should you make default in paying the specified amount of rent you shall be dealt with according to law." According, therefore, to the terms of the lease, the sums payable to third parties were regarded as rent due to the landlord, but under the agreement between the parties, a portion of the entire rent payable was to be paid to third parties. Those [72] third parties did not accept this arrangement and would consequently look to the plaintiffs for payment, and it seems to me that, having regard to this as well as to the terms of the lease, the portion of the rent which the tenant defendants agreed to pay to third parties did not cease to be rent by reason of that agreement. As soon as they failed to make such payments to the third parties, the plaintiffs were entitled to sue for the moneys so due and they could not be restrained until they had been compelled by the third parties to pay themselves. No doubt, it might happen by the default of the tenant defendants that the plaintiffs might be put to the expense of defending a suit. In that case they would be entitled to claim as damages any money for which they might have become liable on this account or for any other cause. But that would not affect the amount of rent for payment of which the lease had been granted or make the money which defendants had failed to pay the third parties other than rent. It is significant that by the terms of the lease a *dakhila* for the rent of each year was not to be granted until the defendants had given proof of the payment to the third parties. I am accordingly of opinion that this suit is a suit for arrears of rent, and that consequently a second appeal lies. It is, I think, unnecessary to express any opinion on the point referred to us except so far as relates to this suit.

MACPHERSON, J.—I cannot distinguish the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (2) from the present case on the ground stated by Mr. Justice Prinsep, for I see nothing in the report of that case to indicate that the assignment of the rent under the arrangement between the landlord and the tenant had been accepted by the assignee, who was

(1) 2 C. W. N. 455. (2) 11 C. 221.

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a third party, the zemindar, any more than it was accepted in the present case. In *Rutnessur Biswas* v. *Hurish Chunder Bose* Ryasona Dasi gave an *ijara* to Gobind Chunder Sircar, and one of the conditions was that Gobind Chunder should pay a specified portion of the rent to the zemindar who was Ryasona's landlord. Gobind Chunder gave a *darijara* to Hurish Chunder Bose, subject to the conditions under which he himself held, and then resigned the *ijara*. Ryasona confirmed the *darijara* to Hurish Chunder, who thereupon became her tenant, and [73] afterwards transferred her entire right in the land, as well as the right to receive the *darijara* rent, to Rutnessur Biswas. Hurish Chunder thus became the tenant of Rutnessur, who sued him for rent which became due after the transfer, and included in his claim that portion of the rent which Hurish Chunder ought to have paid to the zemindar. It was this portion of the rent which the Court treated as having been assigned to a third party, that is to say the person who was in the first instance the landlord of Ryasona and afterwards of Hurish Chunder, and therefore recoverable not as rent but as damages. The fact that there had been a transfer of the landlord's as well as of the tenant's right made, it seems to me, no difference as regards the question which was decided. In the present case, as in *Rutnessur Biswas* v. *Hurish Chunder Bose*, the plaintiff seeks to recover from the defendant his tenant a portion of the rent which the tenant undertook to pay, but did not pay, to certain persons who were the landlords of the plaintiff, his lessor, and the question is whether this money is recoverable as rent or as damages. If it is rent a second appeal will lie, if it is not rent there is no right of second appeal.

In my opinion, the money is rent and recoverable as such, and did not cease to be rent by reason of the so-called assignment—an assignment to which the assignee was not a party and which was not accepted by him. The money was undoubtedly a part of the entire sum which the defendant undertook to pay to the plaintiff, his landlord, as rent for the use of the land. According to the terms of his lease he was to pay this money on the plaintiff's account to certain persons who were the plaintiff's landlords; he was to take from them receipts in the plaintiff's name for the money so paid, and at the end of the year he was to produce those receipts and take from the plaintiff a receipt for the entire amount of the rent inclusive of the balance which he was to pay to the plaintiff direct. This I think clearly shows that in the contemplation of the parties the money did not cease to be a part of the rent or recoverable as such. If the defendant defaulted to pay the money in the way agreed on between himself and his landlord, the assignee had no cause of action against him, and the plaintiff never in any way lost or waived his right to recover the money which was not so paid as a part of the rent. In fact there was to be no discharge for the rent, [74] unless and until the defendant produced the receipts for the payments which he undertook to make.

But assuming that, as a general rule, rent as such cannot be assigned, in the present case, there was, I consider, no such assignment of the money sought to be recovered as to deprive it of its character as *rent*, and the plaintiff did not by the arrangement made with his tenant as to the mode of payment lose his right to recover it from him as a part of the rent. If the money is rent and recoverable as such, the plaintiff cannot, I conceive, by seeking to recover it as damages and calling his suit a suit for damages, alter the real character of the suit and deprive

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the defendant of the right of appeal to which he would otherwise be entitled. It is possible, of course, that he would be entitled to add to his claim for the rent a claim for damages, if he had suffered any damage by the defendant's failure to adhere to the arrangement, but this does not I think affect the question now raised.

I would, therefore, say that the amount claimed is rent and recoverable as such, and that a second appeal lies.

GHOSE, J.—I agree with Mr. Justice Macpherson in the view that he has expressed.

With reference to the observation which Mr. Justice Prinsep has made as to what I and Stevens, J., held in the case of *Mohabut Ali* v. *Mahomed Faizullah*, I desire to say that though at the time I thought that the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* was distinguishable, yet, on further consideration of the facts of that case, as are to be gathered from the report, and the judgment in the case, I think that, in principle, they are not distinguishable, though no doubt there are some distinguishing features.

I hold that the claim in this case is for rent, and that a second appeal lies to this Court.

HILL, J.—The precise question referred to us does not, I think, arise on this appeal since there is, so far as I can perceive, nothing in the case to indicate that there was an assignment of rent. It is, however, remarked in the order of reference, "The question for determination then that arises at the outset is whether the money for which this suit is brought is rent or not. If it is rent, a second appeal will lie. [75] If it is not rent, a second appeal is barred by s. 586 of the Code of Civil Procedure;" and it was to this question that the argument before us was directed. It was, I think open to the plaintiffs to frame their suit either as a suit for the recovery of rent or as a suit for damages for breach of the agreement to pay a portion of the rent to the plaintiffs' landlord; and in answering the question stated above, I should feel disposed to lay greater stress on those considerations which bear more immediately upon the pleadings in the suit and on the understanding of the parties and of the Courts below with respect to it than upon those which concern the questions whether the sums which the defendants failed to pay to the plaintiffs' landlord retained the character of rent. They may have done so, but assuming that they did, that in itself would not, it appears to me, be conclusive of the question before us which, as I understand it, is not whether a suit for damages for breach of the agreement would lie, but whether the suit, as framed, is to be regarded as a suit for rent or a suit for damages as distinguished from rent, and it is upon the answer to the latter question that the right of appeal depends. The plaintiffs have undoubtedly described the suit in the heading of the plaint as a "suit for damages," which damages they lay at Rs. 185-8 annas, and I find nothing in the body of the plaint inconsistent with such a claim. The defendants, in the third paragraph of their written statement, took exception to the form of the suit, and the question thus raised formed the subject-matter of the second issue in the Court of first instance and was determined by the Munsif on the authority of the case of *Rutnessur Biswas* v. *Hurish Chunder Bose* (1) in favour of the plaintiffs. What the Munsif says on the subject is this: "I am of opinion that the amount claimed can be recovered not as rent but as damages. The suit in its present form does

(1) 11 C. 221.

therefore lie." It is, I think, clear that, in its earlier stages, the parties themselves treated the suit as one for damages, and they moreover went to trial upon the issue whether, being a suit of that nature, it would lie. I should not myself, under these circumstances, feel disposed to allow the defendants at the present stage to change their ground and to treat the suit now as one for rent, so as to secure for themselves a right of appeal which they would otherwise not possess. It is, I think, to be [76] borne in mind that we are not now dealing with a merely abstract question, but the whole case being, under the rules of Court before us for decision, considerations applicable to it in particular ought to be allowed due weight. On the grounds then that the suit was launched by the plaintiffs as one for damages, and that it was so treated and understood in the Courts below, I should feel inclined to answer the question whether a second appeal lies in the negative. But as the rest of the Court are of the contrary opinion, I ought I think, in the view I take of the scope of the question now before us, to defer to them, and I accordingly concur in the answer which they propose to give to the reference.

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STEVENS, J.—I concur in the judgment which has been delivered by MACPHERSON, J.

I agree with GHOSE, J., in thinking on further consideration that in principle the case of *Mohabut Ali* v. *Mahomed Faizulla* is not to be distinguished from that of *Rutnessur Biswas* v. *Hurish Chunder Bose.*

PRINSEP, J. (MACPHERSON, GHOSE, HILL, and STEVENS, JJ., concurring).—The suit will, therefore, be remanded to the lower appellate Court for trial, more especially with reference to the objection taken that a portion, if not the whole of the claim, is barred by reason of s. 43 of the Code of Civil Procedure. We have no materials upon which we can decide this issue. The lower appellate Court will also consider any points which may have been properly raised before it on this appeal, having regard to the character of the suit as a suit for arrears of rent. The costs will abide the result.

Appeal allowed; case remanded.

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27 C. 77 = 4 C.W.N. 254.

[77] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

JOGENDRA CHUNDER GHOSE (*Defendant No.* 8) *v.* FULKUMARI DASSI AND OTHERS (*Plaintiffs*).* [25th May, 1899.]

Hindu Law—Maintenance—Widow's right to a share in lieu of maintenance, on a partition suit having been instituted—Transfer of Property Act (IV of 1882*), s.* 52—Lis Pendens.

After the institution of a partition suit by a member of a joint Hindu family consisting of six brothers and a mother, but before the summonses were served, one of the sons (defendant No. 1) transferred his share of the property, alleging it to be one-sixth, to a third party, who was subsequently added as a party defendant to the suit. At the time of the transfer both the transferor and the transferee had notice of the said suit. On a question having been raised as to

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* Appeal from Original Decree No. 342 of 1896, against the decree of Babu Rajendra Coomar Bose, Subordinate Judge of 24-Pergunnahs, dated the 21st of September 1896.

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what share of the property the transferee was entitled to: *Held*, that inasmuch as the suit for partition was instituted by one of the sons, the mother had an inchoate or quasi-contingent right, which ripened into an absolute right on a partition having taken place (which happened in this case), and therefore she having been entitled to a share, the transferee could not get more than what the transferor was entitled to at the time of the transfer, *i e.*, an one-seventh share of the property.

Held, also, that inasmuch as both the transferee and the transferor had notice of the partition suit at the time of the transfer, and as there was a dispute about the shares, s. 52 of the Transfer of Property Act applied to the case.

[**F.**, 27 C. 551 (554); (1913) M.W.N. 672 = 14 M.L.T. 185 = 20 Ind. Cas. 976; **Appr.**, 31 B. 393 = 9 Bom.L.R. 530; **R.**, 6 Ind. Cas. 196 (197); 8 Ind. Cas. 288 (289) = 6 N.L.R. 140; 80 P.R. 1903 = 19 P.L.R. 1904 (**F.B.**); 124 P.L.R. 1904; **Cons.**, 31 C. 745 (752); **D.**, 31 C. 658 (662).]

THIS appeal arose out of a suit for partition of the estate of one Jagdis Chunder Sarkar who died leaving six minor sons, and a mother and a widow. The suit was instituted by one of the sons, making the other sons, the mother, and the grandmother defendants. After the institution of the suit, but before the service of summonses upon the defendants, defendant No. 1 sold his share in a certain property, alleging it to be an one-sixth, to one Jogendra Chunder Ghose.

The defence of defendant No. 1 was to the effect that the mother was not entitled to any share, as she had property of [78] considerable vaule given to her by his father; and that in regard to property No. 1 the defendant had sold his one-sixth share to one Jogendra Chunder Ghose. Upon the written statement of defendant No. 1 being filed Jogendra Chunder Ghose was added as a defendant in the case, being defendant No. 8, and his defence was that he was rightfully entitled to the property purchased by him, and that the defendant No. 6, the mother, could not claim any share thereof. The Subordinate Judge found that at the time of the transfer of property No. 1 by defendant No. 1 to defendant No. 8, both of them were aware of the institution of the partition suit, and he overruled the objections of the defendants and made a decree for partition, directing that the grandmother should obtain maintenance, and defendant No. 6, the mother, should get a share in the property, and that the property should be divided into seven equal shares, and that the share of the defendant No. 1 should be assigned to defendant No. 8.

Against this decision the defendant No. 8 preferred an appeal to the High Court.

Dr. *Rash Behary Ghose*, Babu *Umakali Mukerjee*, Babu *Surendro Nath Roy*, and Babu *Sarut Chunder Roy Chowdhry*, for the appellant.

Babu *Nilmadhub Bose*, Babu *Dwarka Nath Chuckerbutty*, and Babu *Dasrathi Sannyal*, for the respondents.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.):—

JUDGMENTS.

MACLEAN, C. J.—This is a suit for the partition of certain properties which are mentioned in the schedule to the plaint—properties which belonged to one Jagdis Chunder Sarkar, who died in the month of Joist 1293, leaving him surviving his minor sons, the plaintiff and the defendants Nos. 1, 2, 3, 4 and 5, and his widow, the defendant No. 6 and the defendant No. 7, who was his own mother. No question arises in relation to any share of the latter in the property. The suit was instituted on the 27th of August 1895, and summonses were served upon the defendants on the 14th September in the same year. In the interval,

on the 12th September, the defendant No. 1 had, for valuable consideration, transferred his share in one of the properties [79] treating (subject to what I will say in a moment) that share as a one-sixth share, to the defendant No. 8, who was subsequently on the 5th December 1895 made a party to the suit.

The real question in dispute is whether the defendant No 8 is entitled to a one-sixth share, or only to a one-seventh share in the property sold to him, the contention on the part of the mother (defendant No. 6) being that, on partition, she is entitled to a share, equally with her six sons, which would render the estate divisible into seven shares, and not six. The case came on for trial, and the learned Subordinate Judge of the 24-Pergunnahs delivered his judgment on the 21st of September 1896, a judgment which was adverse to the contention of defendant No. 8. The case was then carried on appeal to this Court, and on the hearing of that appeal, this Court held that there must be a remand to have the following further issues tried, namely: (1) whether the defendants Nos. 1 and 8, or either of them knew the fact of the institution of the suit before the execution of the first conveyance in favour of defendant No. 8 by defendant No. 1; and (2) whether, exclusive of the property covered by the earlier of the two conveyances executed by defendant No. 1, in favour of defendant No. 8, there still remained property appertaining to the share of defendant No. 1 sufficient to contribute to the share of No. 6, and whether a partition can be effected, and, if so, in what way, so as to exclude the property covered by the said conveyance by treating it as allotted to the share of No. 1. These issues were referred for trial to the Court below, with directions to take any additional evidence which the parties might desire, and the Court below was to return its finding on these issues.

It is unnecessary to say anything about the finding on the second issue, because it appears that the defendant No. 1 has parted with all his interest in the other properties to other purchasers, who are not parties to the suit, and so no practical effect can be given to the suggestion of contribution implied by that issue.

On the first issue, the Subordinate Judge has found that both defendant No. 1 and defendant No. 8 had notice of the present suit on the 12th of September.

[80] I may point out, incidentally, that both defendant No, 1 and defendant No. 8 would appear to have entertained some doubt as to whether the former's share were really a sixth, for there is a covenant in the *kabala* that, if the vendor's statements be found to be untrue (one of which was that he was entitled to a one-sixth share) that is to say, that if it be afterwards found that his interest was less than the extent of interest which was there declared, he should in that case refund the consideration-money, in proportion to the extent by which the same might fall short.

It is urged for the appellant that, before a partition was actually effected, the defendant No. 1 had an absolute right to deal with his share, and to transfer that share to a purchaser for value free from any claim of his mother to a share on partition; and that the right of the mother to a share on partition is not an absolute or vested right, but a contingent right only, contingent on the partition being actually made. He further urges that the case is not within s. 52 of the Transfer of Property Act.

To this the mother (the respondent) replies that, inasmuch as under the Hindu law of the Bengal School, which admittedly governs the present case, the mother would, if there were a partition, be clearly entitled to a

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share equal to that of her sons, the defendant No. 1 could not deal with his share so as to prejudicially affect his mother's right; that he could not transfer to a purchaser a larger interest than he himself had; and that, inasmuch as the transfer was effected after the institution of the suit, s. 52 of the Transfer of Property Act applied.

It is, I think, clear upon the authorities—I need only refer to the case of *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (1) and the case of *Sorolah Dossee* v. *Bhoobun Mohun Neogy* (2)—that in the event of the sons partitioning the property, their mother is entitled to a share equal to their own respective shares, and that she takes this share in lieu of, or by way of provision for, her maintenance, for which the partitioned estate is already bound.

The appellant does not dispute, nor could he successfully [81] dispute, this proposition of law, but he contends that there is no such right in the mother, unless and until a partition has actually taken place, and great reliance is placed upon certain passages in the judgment of Mr. Justice Dwarka Nath Mitter in the case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (3) and, without doubt, those passages do give support to the appellant's contention.

That learned Judge says: "The learned Counsel for Doolaro has contended that, in the case before us, partition must be *held to have actually taken place*, and he cited a ruling of Her Majesty in Council to the effect that division by metes and bounds is not at all necessary to constitute partition under the Mitakshara." And later on he says: "It has been said that the question of maintenance is quite distinct from the question before us, but there can be no doubt that the share that is given to a Hindu mother at the time of partition is given to her for no other purpose than as a provision for her maintenance. She has no right to ask for maintenance after she has got such a share, and if a partition *has been effected* in this case, Golaba's suit for maintenance must have been dismissed on that ground alone. It is unnecessary, therefore, to decide whether Golaba had a right to alienate the share assigned to her by the principal Sudder Amin as her *stridhan*, under the Mitakshara law. Our finding is, that she had acquired no right to that share, as she died before partition had been *actually* made." The last sentence indicates that the question there was one of succession, and that as the mother had died before any actual partition had been made, she had acquired no right to any share, and the Judge's remarks must be taken in connection with the case he was then dealing with, which is one substantially differing from the present, where a partition has actually been effected, which would undoubtedly give the mother a right to a share according to Mr. Justice Mitter's view, and when the question here is whether that right can be defeated by a transfer from one of the sons.

It is said for the appellant that Mr. Justice Mitter's view is endorsed by Mr. Justice Wilson in the case of *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (2). There Mr. Justice Wilson cites the [82] passage which I have just read, and he says: "The Court seems to me here to lay down, and to lay down not by way of *dictum* or mere expression of opinion, but as the ground of decision, that when a mother takes a share on partition, her title arises from the partition alone, and that she had no pre-existing vested right except a right of maintenance."

(1) 16 C. 758=16 I.A. 115. (2) 15 C. 292. (3) 9 W.R. 61.

In that case again the question was one of succession; the respondent, however, does not put her case so high as that of a pre-existing *vested* right to a share, but she says she has an inchoate or quasi-contingent right which may ripen or crystalise into an absolute right, if, and when, the partition takes place, which happened in the present case.

With respect to the case of *Lakshman Ram Chandra Joshi* v. *Satya Bhama Bai* (1) cited for the appellant, the true nature of that suit is stated by Mr. Justice Wilson in the case of *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (2). It is not a case which bears directly upon the present, and though it is relied upon by the appellant, there are passages in the judgment of Mr. Justice West which support the respondent's view. For instance, that learned Judge says at p. 508 of the report: "The mother's ownership, which has according to this view been extinguished, revives again on a partition amongst her sons; their ownership in the meantime is complete." But if there existed in the mother any such ownership, must not a purchaser from a son of his share—I am not speaking of a sale for the payment of the father's debts—purchase subject to that right? Mr. Justice Wilson does not share Mr. Justice West's view; he thinks that on partition an old right does not revive, but that a new right arises. However, the case of *Lakshman Ram Chnadra Joshi* v. *Satya Bhama Bai* (1) is in its circumstances so different from the present that it cannot be regarded as an authority for the proposition for which the present appellant contends. If, as the authorities appear to establish (see *per* West, J., at p. 506 of the report of that case), the widow's maintenance, specially as against the sons, is a charge on the estate, a right *in rem* in the [83] fullest sense adhering to the property into whatever hands it may pass, a right convertible, in the event of a partition, into a right to a share equal to that of sons, it is difficult to see upon what principle a son can so deal with his share as to defeat that right of his mother.

In my opinion defendant No. 8 cannot, as between the mother and himself, stand in a better position than his transferor defendant No. 1, and that, as on a partition defendant No. 1 would only be entitled to a seventh share, defendant No. 8 is not entitled to any more; in other words, he must be taken to have purchased, subject to the right of the mother, if there were a partition, to have a share allotted to her in lieu of her maintenance. There appears to me to be some analogy between this case and the principle of the case of *Byjnath Lall* v. *Ramoodeen Chowdhry* (3) in the Privy Council, where it was held that, "where the owner of an undivided share in a joint and undivided estate, mortgages his undivided share, he cannot by so doing affect the interests of the other sharers, and the persons who take the security, that is, the mortgagees, take it subject to the right of those sharers to enforce a partition, and thereby convert what is an undivided share of the whole into a defined portion held in severalty."

But whether the view expressed above be or be not sound, it seems to me that the case is within s. 52 of the Transfer of Property Act. The transfer undoubtedly took place after the institution of the suit, and both parties to the transfer had notice of the suit. It is, however, urged for the appellant that this is not a "contentious suit or proceeding in which any right to immoveable property is directly and specifically in question" within the meaning of the section.

(1) 2 B. 494. (2) 15 C. 292 (313). (3) 1 I. A. 206=21 W. R. 233.

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It is said upon the authority of the case of *Radhasyam Mohapattra* v. *Sibu Panda* (1) that a suit does not become "contentious" until the summons has been served upon the opposite party, but no reason is assigned by the learned Judges for their conclusion. I am inclined to think this view proceeds upon some conlusion between [84] what is 'contentions,' and the exact point of time when a *lis pendens* is constituted. I should infer that the conclusion was arrived at by analogy to the Enlglish cases, which decide that, as between plaintiff and defendant, the service of the subpœna constitutes the *lis pendens* between them [see *Bellamy* v. *Sabine* (2).] We are, however, relieved from going into the question as to the precise point of time when a *lis pendens* is constituted in this country whether, as between plaintiff and defendants or as between co-defendants, for the section says: "During the active prosecution * * * of a contentious suit, etc., etc.," which indicates with reasonable clearness that, whilst the suit is being actively prosecuted, the property is not to be transferred or dealt with so as to affect the rights of any other party thereto, under any decree or order which may be made therein. It is not suggested that this suit was not being actively prosecuted when the transfer was executed. In this view I fail to see how the case cited is any authority as to what is or what is not a "contentious" suit. A contentious suit is a suit involving contention, and it is perhaps difficult to predicate of any suit, at the moment of its inception, whether or not it is likely to be contentious; but if, in point of fact, it turns out to be a suit which was contested, as is the case here, then, to my mind, the suit is a contentious one and the section applies. It seems to me that in order to appreciate whether the section applies, we must regard the event, and in this case the event showed a contested suit.

We are referred, however, to the case of *Khan Ali* v. *Pestonji Edulji Guzdar* (3) as an authority for the proposition that this section does not apply to a partition suit upon the ground that it is not a suit or proceeding, "in which any right to immoveable property is directly or specifically in question." I scarcely think the Court intended to lay down any such wide proposition. The Chief Justice says :" I do not think that that section applies to a suit for partition in which the shares of the parties and the rights of the parties to the shares are not disputed." Here, however, the [85] shares of the parties are disputed, so the present case is distinguishable.

I have already alluded to the case of *Bellamy* v. *Sabine* which has been relied upon by both sides, and which has been adopted and followed in this Court in the case of *Raj Kishen Mookerjee* v, *Radha Madub Haldar* (4). It is not pertinent to the case before us save as enunciating, according to the views held by the Courts in England, the foundation of the doctrine as to the effect of *lis pendens*.

For these reasons the appeal fails, and must be dismissed with costs.

BANERJEE, J.—I agree with the learned Chief Justice in thinking that the judgment of the Court below is right. The suit out of which this appeal arises was brought by one of six brothers against the other five brothers, their mother and their grandmother, for partition of the property, moveable and immoveable, inherited by the brothers from their

(1) 15 C. 647.
(2) (1857) 1 De Gex and J. 566 (586).
(3) 1 C. W. N. 62.
(4) 21 W.R. 349.

father, after determining the question whether the mother and the grandmother are entitled to a share, or to maintenance only; and the prayer of the plaintiff was for division of the property by metes and bounds into eight, seven, or six shares, according as in the judgment of the Court the mother and the grandmother both, or only one of them, or neither of them, had a right to a share.

The defence of the defendant No. 1 was to the effect that the mother was not entitled to any share as she had property of considerable value given to her by his father; that, in regard to property No. 1, the defendant had sold his one-sixth share to Jogendra Chunder Ghose, and that in regard to that property there could not be any partition except under certain rules which had been previously agreed to between the parties. Upon the written statement of the defendant No. 1 being filed Jogendra Chunder Ghose was added as a defendant in the case, being the defendant No. 8, and his defence was that he was rightfully entitled to the property purchased by him, that is the one-sixth share of the defendant No. 1 in property No. 1, and that the [86] defendant No. 6, the mother, could not claim any share thereof. I need not consider the other objections taken by the defendant No. 8 in his written statement.

The Court below overruled the objections of the defendants Nos. 1 and 8 and made a decree for partition, directing that the grandmother, the defendant No. 7, should obtain maintenance at a certain rate; that the defendant No. 6, the mother, should have a share in the property; that the property should be divided into seven equal shares, and that the share of the defendant in property No. 1 should be assigned to the defendant No. 8.

Against this decree, defendant No. 8 preferred an appeal. At the first hearing of that appeal, it appearing to this Court essential to the right decision of the case that certain issues, which had not been considered in the Court below, should be framed and tried, namely (1) whether the defendants Nos. 1 and 8, or either of them, knew the fact of the institution of the suit before the execution of the first conveyance in favour of defendant No. 8 by defendant No. 1; and (2), whether exclusive of the property, covered by the earlier of the two conveyances executed by the defendant No. 1 in favour of defendant No. 8, there still remained property appertaining to the share of defendant No. 1 sufficient to contribute to the share of defendant No. 6, and whether a partition can be effected, and, if so, in what way, so as to exclude the property covered by the said conveyance by treating it as allotted to the share of defendant No. 1, the case was remanded for a finding on those issues.

The Court below has found that both the defendant No. 1, and the defendant No. 8, were aware of the fact of the institution of the suit before the execution of the conveyance in question, and that there is not enough property belonging to the share of defendant No. 1, excluding the property covered by the first conveyance in favour of defendant No. 8, to contribute to the share of defendant No. 6. It is now contended on behalf of the appellant that the Court below is wrong in holding that the defendant No. 6 is entitled to any share in the property covered by the conveyance executed in favour of the appellant [87] by the defendant No. 1, that is, in a one-sixth of an 8 annas share which was owned by the father of defendant No. 1, and the grounds upon which this contention is based are two, the first ground being, that as the right of the defendant 6, the mother of the plaintiff, and of the defendants Nos. 1 to 5 to claim a share arises only upon partition being made of their joint paternal

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property by her sons, and as previous to such partition the defendant No. 1 had transferred his share in property No. 1 to defendant No. 8, he must be taken to have acquired that share free from the claim of the defendant No. 6, and the second being, that the additional reason upon which the Court below has based its decision in favour of defendant No. 6, namely, that the defendant No. 8 is bound by the doctrine of *lis pendens*, is an erroneous reason, the doctrine of *lis pendens* not being applicable to this case.

I shall deal with these two contentions separately.

In support of the first contention, it is argued that as the right of the mother to claim a share in her husband's estate arises only upon partition by her sons, and as no such partition had been made until after the alienation in favour of defendant No. 8, the purchase by the defendant No. 8 of a one-sixth-share from defendant No. 1 cannot be held to have been subject to the right of defendant No. 6, which had not come into existence at the date of the alienation. It is further urged that the mother's right to a share in her husband's estate is not in the nature of an absolute right to the estate, but is only in lieu of, or by way of provision for, the maintenance for which the estate is liable, and as a purchaser from one of the sons has been held not to be bound by any claim of the widow for maintenance, no more can he be bound by her claim for a share on partition which is only in lieu of, and as a provision for, such maintenance. And in support of this argument, the cases of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1), *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (2) *Sorolah Dossee* v. *Bhocbun Mohun Neoghy* (3), *Lakshman Ram Chandra Joshi* v. *Satya Bhama* [88] *Bai* (4), *Adhiranee Narain Coomary* v. *Shonamalee Pat Mahadai* (5), and *Barahi Debi* v. *Debkamini Debi* (6) have been relied upon.

The right of the mother to a share on partition is founded upon the following passage in the Dayabhaga: "When partition is made by brothers of the whole blood after the demise of the father an equal share must be given to the mother. For the text expresses 'the mother should be made an equal sharer.'" Chapter II, s. III, para. 29.

With reference to the above passage in the Dayabhaga it has been held, and it must now be taken as settled law, that the mother's right to claim a share arises only when her sons come to a partition, in other words, that she cannot enforce her claim to a share so long as her sons remain joint and do not ask for partition. But there is nothing said in this passage, or in any other authoritative text of Hindu law, as to the mother's right to a share on partition being so absolutely non-existent before partition, that it may be defeated by any of her sons alienating his share before coming to a partition.

In my opinion, the correct view to take of this right would be to hold that it is an inchoate right as long as no partition is come to amongst the sons, and it becomes actually enforceable only when the sons come to a partition; or in other words, that the right, when it becomes enforceable by reason of a partition being come to among the sons, is enforceable, not only as against the sons, and as regards so much only of the joint property as at the date of partition is in the hands of the sons, but also as against any person deriving title from any of the sons, and as regards the property to which they may have so derived title, subject to certain qualifications

(1) 9 W. R. 61. (2) 16 C. 758=16 I. A. 115. (3) 15 C. 292.
(4) 2 B. 494, (5) 1 C. 365. (6) 20 C. 682.

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and limitations which it is unnecessary to discuss in detail in this case, having regard to the facts found by the Court below, the correctness of which has not been practically impugned. It must be taken to be a correct proposition of law that no owner of property can convey to any [89] person a higher right than what he himself possesses except under certain special circumstances. The purchaser, therefore, of joint family property from a member of a joint Hindu family must take it subject to the rights of his vendor's co-sharers to demand partition and subject also to such rights of other persons who were not strictly speaking co-sharers with the vendor at the date of the alienation, as may arise under the Hindu law upon partition.

The correctness of this general proposition, which is supported by the case of *Bilaso* v. *Dinanath* (1), cannot, I think, be disputed. The case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (2) relied upon by the learned vakil for the appellant, does not really conflict with the view I take. The point actually decided with reference to the mother's share in that case was that such share could not be claimed by a devisee from the mother when she died after the decree of the first Court in a partition suit, but before the hearing of the appeal from that decree, and that was a point very different from the one that arises in this case. Nor is the case of *Barahi Debi* v. *Debkamini Debi* (3) in point, as it was held with reference to the facts of that case that there was no partition of "the bulk of the family estate," and that what was sought to be divided was not "anything more than a small outlying piece of property" of which one of the sons had sold his share to the plaintiff.

The second branch of the first contention is that as the mother's right to a share has been held in two of the cases cited, namely, *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (4), and *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (5) to be a right that arises in lieu of or by way of a provision for her maintenance, such a right must be subject to the same limitation as the right to maintenance is, and as the right to maintenance is, according to the cases of *Adhiranee Narain Coomary* v. *Shonamalee Pat Mahadai* (6) and [90] *Lakshman Ram Chandra Joshi* v. *Satya Bhama Bai* (7) not enforceable against a purchaser from any of the sons, the right to a share on partition must in the same way be held not to be enforceable against such a purchaser. I am of opinion that this argument is not sound. For the reasons for the decision in *Lakshman Ram Chandra Joshi's* case and in that of *Adhiranee Narain Coomary* against the widow's claim in regard to maintenance are inapplicable to her claim to a share on partition. I should, in the first place, observe that though in the two cases of *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (4) and *Hemangini Dasi* v. *Kedarnath Kundu Chowdhry* (5) the mother's claim to a share has been held to be a claim in lieu of or as a provision for her maintenance, in neither of those two cases did the point arise for decision which we have now to consider, and it was only incidentally that the observations, upon which the learned vakil for the appellant relied, were made.

Now the main reason upon which the decision in the case of *Lakshman Ram Chandra Joshi* v. *Satya Bhama Bai*, so far as it touches the present question turned, is incorporated in the following passage in the judgment of Mr. Justice West: "If then a mother foregoing her claim to a separate provision out of the personal property resides with her sons or

(1) 3 A. 88. (2) 9 W. R. 61. (3) 20 C. 682.
(4) 15 C. 292. (5) 16 C. 758 = 16 I.A. 115. (6) 1 C. 365.
(7) 2 B. 494.

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step-sons and is maintained by them she must submit, I think, to their dealing with the estate."

Although that observation may hold good as regards her claim for maintenance in respect of which she may obtain a decree fixing its amount and declaring it to be a charge on any definite property, and although her not doing so may be treated as an omission on her part, the consequence of which is to disentitle her to enforce her claim against a purchaser in good faith from any of her sons, could the same thing be said in regard to her claim to a share upon partition? She cannot enforce such a claim so long as her sons do not come to a partition; she cannot ask for any decree declaring her [91] right to a share in any particular property until a partition is come to by her sons; and therefore, though consequences adverse to her claim for maintenance may arise from her omission to do what she might have done to place her claim on a secure basis, that is a consideration which is wholly inapplicable to her right to a share upon partition.

Another reason given [see *Adhiranee Narain Coomary* v. *Shonamalee Pat Mahadai* (1)] for holding that a widow's claim for maintenance as a charge is not enforceable against a purchaser from any of the sons is, that it would be inconvenient to allow her to enforce such a charge by reason of the uncertainty of the claim and by reason of many other similar claims resting upon a similar ground. These also are reasons which would be inapplicable to the mother's claim to a share upon partition. Such a claim is definite in its nature, her share being defined as being equal to that of one of her sons, and the claim to a share being capable of enforcement only by the mother and not by any other member of the family. The reasons, therefore, applicable to the case of a claim for maintenance are inapplicable to the mother's claim to a share upon a partition.

The case of *Barahi Debi* v. *Debkamini Debi* (2), as I have already remarked, does not call for any detailed discussion as the facts of that case were different, and as the learned Judges in their judgment observed: "Of course every case must be determined by its own facts, and there may well be cases in which the main body of the family property is divided, leaving only a small portion joint, and in such a case no doubt the sons would have partitioned the property among themselves, and the right of the widow to have a share set apart for her maintenance would come into existence." On these grounds, I am of opinion that the first contention urged on behalf of the appellant is untenable.

That being so, it is not necessary to discuss the second point at any great length. I would only observe that no valid [92] reason has been shown for our holding that the case does not come within the scope of s. 52 of the Transfer of Property Act. It was urged that there was no contentious suit, at any rate not until the service of summons on the defendant No. 1, and as the transfer in favour of the appellant was made before the service of summons on the defendant No. 1, the alienation in his favour cannot be affected by s. 52. But, as has been pointed out in the judgment of the learned Chief Justice, a suit does not become contentious merely by service of summons on the defendant. Whether or not a suit is contentious must depend on whether or not it is really so. The expression "contentious" suit is, I think, used in contradistinction to a friendly suit in which there is no contest, and the parties bring the suit only to obtain the decree of a Court of Justice, declaring their rights as to which they are themselves in perfect agreement. Was that the nature of this suit?

(1) 1 C. 365.

(2) 20 C. 682.

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Clearly not. The plaint itself raised the question as to whether or not the mother, the defendant No. 6, was entitled to a share; it invited the Court to determine that question; and defendant No. 1 denied the mother's right to a share. Clearly, therefore, there was here a contentious suit in which the right to immoveable property, that is property No. 1 in the schedule to the plaint, was directly and specifically in question.

Great reliance was placed on the case of *Radhasyam Mohapattra* v. *Sibu Panda* (1) as showing that there could not be a contentious suit or proceeding until the service of summons on the defendant. No doubt there is a passage in the judgment of the learned Judges who decided that case which lends some support to this contention; but having regard to the facts of that case, I am of opinion that it is clearly distinguishable from the present. The facts are thus stated in the judgment: "As a matter of fact the defendant No. 2 did not appear to defend the suit. She put in a written statement in which she alleged that she had parted with all her interest in the property to the plaintiff in this suit by virtue of the conveyance to him of the 5th of October 1883, and she asked that he might be made a party to that suit. [93] He was not, as a matter of fact, made a party to that suit, and, as I have said, judgment was given against defendant No. 2, who did not appear to defend the suit. This is the *lis pendens* which the defendant No. 1 seeks to take advantage of." Clearly, therefore, there was no contentious suit there; and I may add that the same remarks apply to the case of *Khan Ali* v. *Pestonji Edulji Guzdar* (2). There also, so far as one can gather from the judgment, it proceeds upon the ground that there was no contentious suit during the pendency of which the alienation in question was made. The second contention of the appellant, therefore, also fails.

S. C. G. *Appeal dismissed.*

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27 C. 93 (P.C.) = 26 I.A. 202 = 7 Sar. P.C.J. 615.

PRIVY COUNCIL.

PRESENT:

Lords Watson and Hobhouse, Sir Richard Couch, and Sir Edward Fry.

[*On appeal from the Court of the Recorder of Rangoon.*]

DOMATY NURSIAH (*Plaintiff*) v. S. R. M. RAMEN CHETTY AND OTHERS (*Defendants*). [29th and 30th June and 13th July, 1899.]

Partnership—Assignment by plaintiff's partners of their shares—Decree for winding up and for an account.

The plaintiff, as a partner in lending a sum of money upon security given, had a half share in the joint adventure with the first and second defendants. These two, without the plaintiff's exonerating them from liability to him, had assigned their shares to two other persons. The assignees were added as co-defendants after this suit had been filed claiming a decree for a judicial winding up, and for an account. It was not proved that the plaintiff had ever relinquished his claim upon the assignors as a partner, though he might have been aware of the assignment. The two added defendants appeared in the Court below, but not upon this appeal.

Held, that the facts were sufficient to entitle the plaintiff to have the winding up of the partnership, and the account decreed against all the four.

The suit had been dismissed by the Recorder as having been prematurely brought before the complete execution of a decree, already obtained, before this

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(1) 15 C. 647. 1 C.W.N. 62.

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suit was filed, by the plaintiff, appellant, against the borrowers of the [94] money; that decree having followed upon an award of arbitrators which directed that all sums realized in the adventure should be divided in equal moieties between the plaintiff and the original defendants. *Held*, that this suit ought to have been allowed to proceed, and should not have been dismissed. The plaintiff having, on this appeal, agreed to account for all money received by him in the transaction, an account should be directed with a declaration that the added defendants were jointly and severally liable to account, with the first and second defendants, for what had been received by them from the adventure.

APPEAL from a decree (26th November 1896) of the Recorder of Rangoon dismissing the suit with costs.

The suit was brought by the appellant on the 11th June 1896 against S. R. M. Ramen Chetty and S. N. A. Soobramonien Chetty, the first and second defendants, now respondents, the plaintiff having been a partner with them in a joint loan of Rs. 30,000 on the 28th June 1892, on a promissory note with security. In this transaction the plaintiff had a one-half share and the defendants the other half. The borrowers were Cadelly Morady and Domaty Moothaloo. The estate of the first of these was under administration, he having died in February 1892. The security consisted of cargo boats, licenses for such boats, and title deeds of house property, handed over.

The plaintiff claimed to have the accounts of the joint adventure taken under a decree for winding up the partnership, with an order for realizing the securities for the loan and for the plaintiff to have his share in the assets.

The following are some of the principal facts. All are stated in their Lordships' judgment. In 1893 the two original partners, who traded in Rangoon, using the initials S. R. M., by their agent, Vyraven Chetty, transferred to the said agent, and to Ardappa Chetty, their interest in the loan. In 1895 disputes as to the transaction were referred by the appellants and Vyraven Chetty to the arbitration of a punchayet. The award, to which the first and second defendants were parties, declared that all sums realized from the debtors should be divided between the plaintiff on the one side and his original partners in the adventure on the other. In 1895 the present appellant obtained a decree in the Recorder's Court against the borrowers for the amount stated in the award due to him.

[95] It was now questioned whether, until that decree should have been completely executed, a suit such as this would, or would not, be premature; and the main question was whether the plaintiff was entitled or not to obtain a decree for the winding up and an account.

On the 9th July the two original defendants answered that they had assigned their interest to others whom the plaintiff had agreed to accept as responsible in their stead; that the assignees should be made defendants, and that they themselves should be exonerated. The assignees were thereupon made parties, and they pleaded that the suit was premature with reference to the decree of 1895 having been left unexecuted.

The Recorder dismissed the suit on the latter ground. He was of opinion (1) that no suit for an account and payment could be brought until the decree of 1895 had been fully and finally executed; (2) that the plaintiff had not paid over sums which the award had directed that he should pay. His judgment was as follows:—

"The facts of this case are shortly these. In January 1892 a sum of money was advanced by the firm of S. R. M. to a man named Cadelly

Morady and to one Domaty Moothaloo. The plaintiff in this case had a half share in this transaction. Subsequently Cadelly Morady died. He had given certain security in the shape of cargo boats and also a house in Rangoon. Letters of Administration were taken out to his estate and afterwards a suit was brought against the representative and a decree was obtained for an account. An account was taken and certain sums were found to be due. These are set out in the plaint. Then it appears there were matters in dispute between the plaintiff and one V. A. R. Vyraven Chetty. These matters were referred to a panchayet and an award was made directing certain payments to be made both by the present plaintiff and by the Chetty. As far as the plaintiff is concerned he has not paid his share. He now sues for an account and for payment of a certain sum which is admittedly in the hands of the third and fourth defendants. He originally sued the first and second defendants, but they appear to have assigned their interest over to the third and fourth defendants. This sum of money is the proceeds of sale of cargo boats, and admittedly the plaintiff is entitled to a share in this property, but the whole amount due from the estate of Cadelly Morady has not been recovered. It is stated that there is a considerable amount still to be recovered in execution of the decree against Cadelly Morady's estate, and that nothing has yet been recovered as against the property which is over in his country, nor has there yet been any thing realized [96] in respect of the property in Rangoon which is of small value. All these facts are not disputed. In fact the amount to which the plaintiff is entitled, supposing that the whole amount due to the estate of Cadelly Morady is realized, is admitted as set out by himself; and the defendants do not dispute that for an instant, but they contend that the suit is premature. The argument is that this decree has yet got to be executed. The execution of the decree may be a very lengthy and a very expensive business, and so far as all the money being realized, it is quite possible that nothing may be realized. Apparently Cadelly Morady has assigned over his property in his country, or a portion of it, to a third person. Other litigation may yet crop up, and until the litigations come to an end, I do not see how the defendants can be called upon to pay over anything to the plaintiff. It may be they would have to pay large sums of money and, so far as the plaintiff actually getting anything more, it may be that he would have to contribute something towards those suits; I cannot say how it will be. At all events the plaintiff is not entitled to a decree directing the third and fourth defendants or any of the defendants to pay over the half share of the proceeds of the sale of the cargo boats to him. If the decree, as against the estate, had been fully satisfied, and the defendants were wrongly retaining in their hands a sum of money which ought to go to the plaintiff, he could, of course, go against them, but I think they are now entitled to say "we have further expenses to meet, and we do not know what they will come to: we are entitled to keep the assets realized in our hands in order to meet these expenses." Furthermore, there is another ground on which I think the plaintiff is not entitled to the decree he seeks, that is, that the plaintiff comes into Court to ask for an account, and for a decree against these defendants, and he has not himself obeyed the directions of the panchayet: some of the cargo boats were in his hands and he was directed to pay over certain portions of the earnings and he was also directed to pay over a half share of the costs, but neither of these directions has he obeyed, so that he is asking for a decree from this Court on the ground that the defendants have not paid over money to him which they ought to have done, while he

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himself is actually in the same position, *viz.*, he has not done what he ought to have done.

"I think the suit is premature and ought to be dismissed with costs."

On this appeal, on which only the original defendants appeared—

Mr. *J. D. Mayne*, for the appellant, contended that there was error in the judgment below. The original defendants had not established any ground for their exemption from liability to account to the plaintiff by the mere fact of the transfer having been made by them of their rights in the partnership adventure. The plaintiff, it was argued, was entitled, notwithstanding the [97] transfer of the interests of the original co-partners, that transfer not forming any real impediment to a decree for the winding up of the transaction and for the direction of an account. It had not been proved that the plaintiff had ever assented to the transfer of the shares in the sense of having agreed that the original defendants should be discharged from all liability to him. There was no sufficient reason for holding the suit to be premature. It could not be alleged that the plaintiff was bound to wait until all the parties entitled to any share under the decree of 1895 had been paid. The plaintiff was entitled to an account of the money already realized and that might be received by the defendants. In the course of the taking such an account any debt due from the plaintiff to the defendants in relation to this adventure could be considered. But that he had not paid money decreed in 1895 formed no ground of defence to this suit.

Mr. *J. Fox*, for the original defendants, the first and second respondents, argued that they having transferred their shares in the adventure to the third and fourth co-defendants, had caused the liability of his clients as the original partners to cease. It was only part of what had taken place that the appellant had been informed of the transfer. He had acted as a person who accepted the responsibility of the added co-defendants. His action had involved the discharge of the original partners. There was no evidence that the present respondents had received any part of the money realized on account of the loan. Whatever was received of the proceeds of the securities for the loan was not received by the respondents, or either of them, or on their behalf, but was received by the third and fourth respondents for themselves. In the events that had happened, the original defendants, the only respondents who now appeared, were not in any way liable to the appellant in respect of the loan of 1892. In any event the appellant's suit was premature, and in dismissing the suit on that ground the judgment of the Recorder was right.

Mr. *J. D. Mayne* was not heard in reply.

JUDGMENT.

Afterwards, on the 13th July, their Lordships' judgment was delivered by

[98] LORD WATSON.—The appellant Domaty Nursiah and the respondents, S. R. M. Ramen Chetty and S. N. A. Soobramonien Chetty, who carried on the business of bankers and money lenders in Rangoon, under the firm's name or mark S. R. M., their agent in Rangoon being the respondent V. E. A. T. Vyraven Chetty, on the 28th January 1892, jointly advanced the sum of Rs. 30,000 to Cadelly Morady (who has since deceased) and one Domaty Moothaloo. Of that sum Rs. 15,000, or one-half, was contributed by the appellant, and the other half by the firm

of the said two respondents, who were his co-adventurers. In order to cover the advance, the borrowers, on the same date, granted to the said respondents, with the consent of the appellant, their promissory note for Rs. 30,000, payable on demand, with interest. In security for the due repayment of principal and interest Cadelly Morady transferred six cargo boats, with their licenses, to the respondents' firm, and four cargo boats with their licenses to T. R. M. Seethumbram Chetty, with the knowledge and consent of the appellant. In further security Cadelly Morady deposited with the appellant, on the joint account of himself and his co-creditors, the title deeds of his half share of a house and land in 38th Street, Rangoon, known as the southern half of 3rd Class Lot 16 in Block F 1.

Cadelly Morady died intestate in the month of February 1892. Thereafter, in the month of November 1892, Cadelly Ramasawmi applied for and obtained from the Court of the Recorder of Rangoon letters of administration to his estate and effects.

In the end of the year 1892, the respondent V. E. A. T. Vyraven Chetty ceased to act for the firm in Rangoon, of which the appellant's co-creditors, Ramen Chetty and Soobramonien Chetty, were the partners. In 1893, Ramen Chetty and Soobramonien Chetty assigned their interest in the loan made by them and the appellant to Cadelly Morady and Domaty Moothaloo, to the said Vyraven Chetty, and the other respondent in this appeal, K. P. A. T. Adappah Chetty. Upon the 10th August 1893, the said Adappah Chetty, writing to the assignors on behalf of himself and the other assignee, after remarking that they had bought up "your share of yours and Domaty Nursiah's partnership transaction with Cadelly Morady undertook [99] the following obligation: "In case we did not pay the said Nursiah's half, and he should file a suit against you, we ourselves are bound to pay the costs therein according to original decision."

It appears from a decision, or award, dated 22nd January 1895, by four persons who acted as arbiters, that they had been applied to by Vyraven Chetty on the 13th day of December 1894, who submitted to them certain accounts, documents, and statements connected with the advance made to Cadelly Morady in January 1892. Vyraven Chetty made the application "under power of attorney from S. R. M. and Korangi Domaty Nursiah of Rangoon;" and it is obvious from the tenor of their decision that the arbiters understood that it was their duty to settle questions arising between Nursiah and the Rangoon firm, of which the respondents Ramen Chetty and Soobramonien Chetty were the members.

The award lays down the principle that Domaty Nursiah and the firm, having each advanced one-half of the loan, must (1) take a half each of the sum and interest which may be realized either through the Court by means of compromise, and (2) each bear one-half of the expenses incurred on account of litigation, and any other manner of expenses that may occur in that behalf. It apportions the income and interest which was derived, "through Nursiah's means," from the Arracan Company, for the use of boats, and also the income and interest arising "through the means of Vyraven Chetty," from the use of other boats, worked by Mohr Bros. The award, which has not yet been implemented, directs that the principal and interest which may yet be realized shall, in like manner, be equally divided.

In 1895, Vyraven Chetty brought an action, in the Court of the Recorder of Rangoon, in the name of the firm, which was creditor in the promissory note, against Cadelly Ramaswami, as the representative of

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Cadelly Morady, in which accounts were taken, and a decree passed for the sum of Rs. 24,663-4, after giving the defendant credit for the sum of Rs. 13,424-4, being the net proceeds of the sale of the cargo boats held in security.

The decree obtained against Cadelly Ramaswami has not been [100] executed. The house and land in Rangoon, of which the title-deeds were delivered in security by Cadelly Morady, have not yet been realized.

The appellant brought the present action in June 1896, in which he called, as defendants, the respondents Ramen Chetty, and Soobramonien Chetty, his original co-creditors. His plaint concluded, *inter alia*, for a declaration that the loan of Rs. 30,000 to Cadelly Morady and Domaty Moothaloo was a joint venture, and that the plaintiff and defendants advanced the money in equal shares; that accounts should be taken, and the venture wound up under the direction of the Court; and that, in the event of the defendants failing to execute the decree which they had obtained against Cadelly Ramaswami, and to realize the mortgaged premises in Rangoon, a receiver should be appointed.

The defendants, Ramen Chetty and Soobramonien Chetty, in their written statement averred that they had assigned their interest in the venture to the respondents Vyraven Chetty and Adappah Chetty, and that the appellant had agreed to accept the said assignees as responsible in their stead. They accordingly pleaded that the action, as against them, ought to be dismissed, and that Vyraven Chetty and Adappah Chetty ought to be made parties to the suit. On the 8th July 1896, they petitioned the Court: "That, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in this suit, it is necessary that (1) V.E.A.T. Vyraven Chetty, and (2) K.P.A.T. Adappah Chetty should be joined as defendants in the suit." The learned Recorder issued an order to the effect craved.

The respondents, Vyraven Chetty and Adappah Chetty, who have not appeared in this appeal, were accordingly joined as defendants, and they lodged a separate written statement. They admitted that the interest of Ramen Chetty and Soobramonien Chetty had been duly assigned to them, and they averred that the appellant, being aware of the circumstance, "entered into an agreement with Vyraven Chetty, the third defendant above named, whereby he agreed to refer the accounts in connection with the said loan, and his deposit account, to the arbitrament [101] of certain persons therein named, and such persons duly made their award." They also averred "that the account sought for in this suit cannot be taken, until the sale of the mortgaged property and the final execution of the said decree, and that there were no matters in dispute in relation to any accounts between the parties at the time of the institution of this suit." They pleaded that the suit as against them should be dismissed with costs.

The joinder of Vyraven Chetty and Adappah Chetty, unfortunately, had not the effect, predicted by the original defendants, of enabling the Court to adjudicate upon and settle all the questions involved in the suit. The main object of the defendant appears to have been, not to aid in the settlement of these questions but to delay a settlement by procuring the dismissal of the appellant's action. The learned Recorder, after hearing evidence, decreed that the suit be dismissed, and that the plaintiff do pay the defendants' costs as taxed.

Their Lordships do not think it necessary to make any observation upon the decree of the learned Recorder, save this—that the facts relied

on in his judgment are, in their opinion, sufficient to show that the plaintiff is entitled to have the adventure judicially wound up, and that the action ought therefore to have been allowed to proceed. 1899 JULY 13.

Their Lordships desire to express their opinion that the respondents have failed to establish that the appellant, although he may have become aware of the assignment of their interest by Ramen Chetty and Soobramonien Chetty to the other respondents, ever consented to accept Vyraven Chetty and Adappah Chetty as responsible to him in lieu of their assignors. Assuming the statements of either set of defendants, bearing upon the plea of novation, to be relevant, they are not supported by the proof. The appellant Domaty Nursiah swears that, at the date of the award, he was not aware that the original defendants had assigned over their share in the loan of Rs. 30,000 to Vyraven and Adappah, and that he "never dealt with them in the matter." In his cross-examination for the respondents, no reference is made to the time when, or the manner in which, he consented to the novation. The respondent Vyraven Chetty, the only witness [102] examined for the defendants, on being shown a letter to the Rangoon firm setting forth the terms of their arrangement to assign their debt to him and Adappah Chetty, but making no reference to appellant, states, "I told plaintiff all about it. He said 'all right.'" The words said to have been used by the appellant on that occasion imply that he had no intention of disturbing an assignment to which he had no right to object; but they cannot be construed as signifying that he accepted the assignees, and parted from his claims against the assignors. PRIVY COUNCIL. 27 C. 93 (P.C.) = 26 I.A. 202 = 7 Sar. P.C.J. 615.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from; and, the appellant having by his counsel at the Bar agreed to account for all money received by him under the joint adventure of the 28th January 1892, to direct as follows: (1) that an account be taken of all the moneys received by the defendants under the said transaction, and of all dealings and transactions of the plaintiff and the defendants in respect of the said adventure, and that, in taking the said accounts, the decision or award of the 2nd January 1895 is to be treated as binding on the parties; (2) to declare that the third and fourth defendants are liable, jointly and severally with the first and second defendants, to pay to the plaintiff all sums found payable to the plaintiff, to the extent of the moneys received under the said adventure by the third and fourth defendants; (3) that there be liberty to the plaintiff and defendants respectively to apply for the payment into Court of any moneys received by the defendants and the plaintiff respectively, and also for directions as to the conduct of the suit brought against the representatives of Cadelly Morady and Domaty Moothaloo, and as to the execution of the decree made in the said suit, and also as to the realisation of the house and land in Rangoon, of which the title deeds were pledged in security by Cadelly Morady; (4) that the costs of process hitherto incurred by the plaintiff in the Court below, as the same shall be taxed, shall be jointly and severally payable to the plaintiff by the defendants, and that future costs shall be reserved for disposal by the Court below.

The respondents S. R. M. Ramen Chetty, and S. N. A. [103] Soobramonien Chetty, must pay to the appellant the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Bramall, White and Sanders.*
Solicitors for the first two respondents: Messrs. *Hopgood and Dowzon.*

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PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse, and Davey, Sir Richard Couch and Sir Edward Fry.

[*On appeal from the Court of the Judicial Commissioner of the Central Provinces.*]

LOKNATH (*Defendant*) *v.* BISSESSARNATH (*Plaintiff*).*
[15th and 16th June and 9th July, 1899.]

Decree—Construction of decree—Assignment of villages part of an impartible estate—Maintenance of a member of a junior branch of a joint Hindu family—Agreement—Arbitration award, decree and settlement thereon—Revenue, by whom payable.

A talukhdar owing an impartible inheritance was the head of a joint Hindu family, of which the defendant, his first cousin, was a member in a junior branch. In 1864 they came to terms as to the latter's claims upon the ancestral estate. A decree in that year founded upon the award of arbitrators between them declared the talukhdar's ownership, and the assignment by him of eleven villages to the junior member, free of liability in respect of the revenue. These terms were entered in an administration paper, or wajib-ul-arz, of the talukh before the settlement of 1867, in the record whereof they were also entered. And they were referred to in a sanad granted to the talukhdar. When the settlement of 1889 was in progress the profits of the eleven villages and the Government demand thereon had greatly increased; and for this jama the talukhdar was liable without any proportionate increase of profit from the eleven villages. In 1881 the talukhdar sued for a declaration that the defendant's right in the villages consisted only in a certain amount of allowance for maintenance derivable from them. He also claimed that the defendant should repay to him a sum which he had paid for local cesses. The defence was that the defendant's right in the eleven villages had been conclusively settled in the above proceedings.

Held, that by the true construction of the decree of 1864, which was the foundation of the title of either party, the profits of the eleven villages belonged to the defendant, and that the revenue was to be paid, as between [104] the two, by the plaintiff with the enhancements, without benefit to him from the increase in the yield of the land. The principle of the judgments below was that the question to be decided was of the kind where the head of a family and a junior member dispute the amount of maintenance that should be paid. But the property assigned in this case was not of the variable character which belonged to an ordinary allowance for maintenance, and there was nothing to show that the Courts had authority to disturb settled arrangements on the ground of their being originally based on claims to maintenance.

The talukha was vested in the plaintiff subject to the right of the defendant to hold the eleven villages, and as between them, the former was liable for the jama and the latter for the local rates and cesses.

[R., 31 C. 111 (120).]

APPEAL from a decree (20th February 1896) of the Judicial Commissioner varying a decree (21st November 1893) of the Judicial Assistant to the Commissioner, which had reversed a decree (7th November 1892) of the District Judge of Bilaspur.

The defendant, appellant, Loknath, belonged to a junior branch of a joint Hindu family of which a former head was Badrinath, the father of the plaintiff, respondent, Bissessarnath, the talukhdar of Taranga, an impartible talukha in the Bilaspur district. Badrinath died in the year 1887, and his son Bissessarnath, who then succeeded him, brought this suit to have it declared that an arrangement, based on an award of arbitrators in 1864, the subject of a decree in that year, and carried into the twenty years settlement of 1867, should be altered. Eleven villages forming part

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of the talukh had been assigned by Badrinath to his cousin Loknath, in lieu of maintenance, the talukhdar agreeing to pay the Government revenue upon these villages, and Loknath to pay the local cesses thereon.

The improved productiveness of the eleven villages assigned to Loknath led to the main question in this suit and on this appeal. The increased profits from the land caused the enhancement of the revenue thereon at the settlement, in a corresponding decree. Under these circumstances the talukhdar complained that the arrangement of 1864 was inequitable and should be altered. Loknath's defence was that it was permanent and that it had been and should be acted upon. The hardship, from the talukhdar's point of view, was that Loknath possessing the villages with [105] all their profits and paying no revenue thereon, he, the talukhdar, had to pay the revenue at greatly enhanced rates, deriving no benefit from the increased profits. The question mainly was whether the talukhdar, was legally entitled to relief from the obligations entered into by his father in 1864 and followed by the subsequent proceedings.

The agreement, of which the true construction was determined, appears in their Lordships' judgment.

In the settlement of 1867, under the instructions of the Settlement Commissoner, the proprietary right in Tarenga talukha was recorded as Badrinath's, as head of the family in possession. The junior members were to receive adequate allowance. Loknath was to hold the eleven villages free of revenue. The arrangement was recognized in the revenue documents. It was recorded in the wajlb-ul-arz of Tarenga by statement from Badrinath, to whom, afterwards, sanads were issued as talukhdar with a reservation of these villages. Badrinath died in November 1887 and Bissessarnath was recognized as his successor. In 1888 a new settlement was made in the district, and dissatisfied with the orders made Bissessarnath filed this suit on the 17th June 1892.

In this he claimed two principal reliefs—

First, a declaration that the defendant's right in respect of the eleven villages was no more than to receive an annual allowance for maintenance, charged on them, of Rs. 1,500: *secondly*, that Rs. 16,798 should be repaid to him by the defendant in respect of local cesses which he, the plaintiff, had paid on account of the eleven villages and on account of sums received by the defendant beyond what was within his right.

The written statement of the denfendant and the issues raised questions of the plaintiff's right on these points; and whether the arrangement of 1864, and the decree of that year, followed by the subsequent proceedings at the settlement of 1867, amounted to a grant of the villages in lieu of maintenance; and whether more recent changes had rendered it inequitable that the arrangements should continue.

[106] The District Judge was of opinion that the arrangement could not be held to be other than a temporary one, but that, until the rate of the defendant's maintenance allowance should be altered, he was entitled to retain the entire profits of the eleven villages in his possession. The first part of the claim was disallowed; but in regard to the cesses, and the amount sued for, he considered that the defendant was liable in that respect. He decided that the defendant was to pay the future dues for cesses, and to pay to the talukhdar the sums paid by the latter on this account. The amount to be paid he estimated at the money claimed.

This judgment was not maintained by the Judicial Assistant to the Commissioner on appeal, who dismissed the suit entirely, after remanding

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it; *first* for trial on the issue whether the arrangement of 1864 and 1867 was a grant of eleven villages in lieu of maintenance, and whether the subsequent change of circumstances had rendered it inequitable that that arrangement should be literally adhered to; and again, on an issue,—"what amount per annum is suitable and proper for the maintenance of the defendant, and on what conditions is he entitled to retain the eleven villages now in his possession." In the end, the Judicial Assistant to the Commissioner dismissed the suit with costs.

On second appeal, the Judicial Commissioner dismissed the defendant's appeal with costs. He disapproved of the opinion of the first appellate Court that the maintenance of a junior member of the family ought to grow in the exact ratio of value of the increase in the value of the family property. But he considered that there was injustice in the arrangement of 1864, whereby, as he said, "the defendant obtains, not the ordinary profit represented by the increase of income minus the increased Government revenue, but the gross profit, and at the same time the plaintiff pays the increased revenue, not out of the increased income, but out of his own pocket." His conclusion was as follows: "I think that all that the defendant can fairly expect is the net increase in the profit of the eleven villages, and that he ought to bear whatever increased burdens have been laid upon the estate in respect of those villages by the recent settlement. The decree of the lower appellate Court is modified to that extent only, and a formal decree will be drawn up accordingly, in which it shall be [107] stated that this arrangement shall have effect from the date of the institution of this suit. The claim for money will stand dismissed."

On this appeal :—

Mr. *C. W. Arathoon*, for the appellant, submitted that the respondent had failed as plaintiff to establish the case in his plaint that he was entitled as proprietor while the defendant was only holding the villages in respect of an allowance for maintenance to be paid out of their net profits. By the terms stated in the award of 1864 carried into the settlement of 1867, the eleven villages were settled with the appellant on the express condition that the respondent was to pay the revenue thereupon, while the talukh was granted to the latter with a reservation of the defendant's right. This also appeared from the sanads granted to the respondent. The terms of the award, as carried into the wajib-ul-arz of the talukh, as well as recorded at settlement, had been recognized and acted upon for many years, and were intended to be permanent. The reasons for setting the arrangement of 1867 aside, or modifying it, were insufficient.

Mr. *A. Cohen*, Q. C., and Mr. *J. D. Mayne*, for the respondent, argued that the right of the appellant in the eleven villages transferred to his possession was not absolute, but that he had a qualified interest only therein, holding them as representing the maintenance to which he was entitled, or in lieu thereof, by arrangement. That view had prevailed in the judgment of the Courts below, where the arrangements arrived at in 1864 and 1867 had reference to the changes that might be effected at settlements, and were not intended to be permanently fixed between the parties in all respects. These arrangements were open to be revised when circumstances had resulted, such as were the great rise in the rental of the lands of the villages, and a corresponding increase in the amount of jama assessed upon them. The intention of the parties could not be said to be carried out if the present state of things were to be maintained. This relief was claimable as the original object could no

longer be attained without the alteration which would place the parties on more even terms. In deciding that the defendant should continue [108] to hold his villages on the same terms as those on which he had held them during the twenty years settlement, the Court of first appeal below had failed to notice that a maintenance would be received by him about twice as large as that which had been considered sufficient for him in 1867, but that the cost of securing this maintenance to him had risen from less than Rs. 1,000 a year in 1867 to nearly double that amount in revenue in 1889. There were decisions in which agreements for maintenance had been held to be of a temporary nature and to be changeable. Reference was made to *Greesh Chunder Roy* v. *Sumbhoo Chunder Roy* (1); *Ram Kullee Koer* v. *Court of Wards* (2); *Nobo Gopal Roy* v. *Amrit Moyee Dossee* (3), and *Ruka Bai* v. *Ganda Bai* (4).

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Counsel for the appellant was not called upon to reply.

JUDGMENT.

Afterwards, on the 8th July, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The parties to this appeal are members of a joint Hindu family, and the dispute relates to the enjoyment of the family property. The plaintiff below, now respondent, is the head of the family and the proprietor of the talukh Tarenga. The defendant, now appellant, belongs to a junior line. He claims enjoyment of 11 villages forming part of the talukh. His right to the net profits of the villages has been maintained by the decree appealed from, but subject to payments of Government jama, which he contends that the talukhdar ought to bear.

It is not shown at what date this portion of the Central Provinces became British territory, nor when regular Courts were established with jurisdiction for revenue or for civil purposes. Counsel have informed their Lordships that the earliest laws they have found in these matters are those passed for civil suits in 1865, and for revenue in 1881; whereas some of the judicial proceedings under consideration are prior to 1865. But it is clear that the officers placed in charge of the country taken over from the Mahrattas exercised authority to settle disputes [109] in some legal modes, which throughout this litigation have, doubtless rightly, been taken as valid and as governing the rights of the disputants. The controversy has been and is as to the construction and effect of the official proceedings.

In the year 1862 Badrinath, the father of the plaintiff, was owner of the talukh, and the defendant Loknath, his first cousin, claimed a moiety of it. Judgment was given by Major Dennys, the Deputy Commissioner of Raipur, on the 16th September 1862. He treated the estate as subject to the Hindu common law, each branch being equally interested in its profits, and liable for its debts. He decreed that Badrinath should pay to Loknath half profits from the usufruct; adding "at the time of the regular settlement it will be competent for the plaintiff to sue for a division of the estate." It appears that this decree was upheld on appeal by the Commissioner, whose decree, dated 16th October 1862, is not in the record.

Loknath sought execution of his decree in the Court of an Assistant Commissioner, Bakhtawar Singh, and in the course of those proceedings the parties effected a compromise through the medium of arbitrators.

(1) 5 W.R. (P.C.) 98. (2) 18 W.R. 474. (3) 24 W.R. 428. (4) 1 A. 594.

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That compromise was reduced to writing, signed by the parties and by the arbitrators on the 29th October 1864, and on the same day embodied in a decree of the Court. There are three versions of it in the record. One is called a copy; of what is not explained. One is an official translation. One is contained in recitals to the decree. Their Lordships agree with the first Court (the Civil Judge of Bilaspur) in holding that the real foundation of the defendant's rights is this decree. It adds nothing to its recital of the award beyond stating the approval of the Judge and ordering "That the award filed by the arbitrators and consented to by the parties be filed with the record. The parties should act up to it."

It does not appear that any of the three versions differ form the others in any matter now under dispute. But the verbal differences are numerous, and as the decree, owing to mutilations and some imperfection in transcription, requires supplement from the award, their Lordships take the document which appears to be a translation of the award actually filed with the record. It is as follows:—

[110] "Compromise arrived at between Badrinath and Loknath on arbitration in the year 1864.

"We are Badrinath tahuddar defendant, and Loknath, plaintiff, residents of Tarenga District, Bilaspur.

"Whereas there existed a dispute between us on account of partition of villages in the tahuddrai of Tarenga talukha and a decree being passed execution proceedings were instituted. Venkat Rao, Jawahir Singh, Babu Ghasisao and Viswanath Sakharam were appointed by us as arbitrators to settle the private dispute. The arbitrators gave us advice, made accounts of debts and villages to our satisfaction, and effected partition, having settled the matter thus: The villages Amakoni and Tikari, rental Rs. 174, Godhi, Datrengi, Madhuban, Lamti and Datrenga, rental Rs. 275, Achanakpur rental Rs. 7, Kesla with hamlet of Kur Diwan rental Rs. 8, Buchipar rental Rs. 30, and Turma rental Rs. 12, in all eleven villages rental Rs. 506-8 out of the whole tahud ilaka are awarded to the plaintiff Loknath. The plaintiff is to possess and enjoy them. The defendant has no power over these. The plaintiff is at liberty to possess, occupy and manage them just as he pleases. But the defendant is to pay out of his own pocket the Government revenue in respect of these villages. The plaintiff has no concern with the payment of the revenue and will not have to pay it. The defendant shall have power over the rest of the villages in the tahud. The plaintiff shall have no power over them. Each is to hold possession of his share. The defendant shall be responsible for the old and the present debts. He may pay it or not. As regards house furniture each is to have what he has at present. But the defendant is to divide equally (with the plaintiff) the buffaloes in his possession. The defendant is to pay the plaintiff Rs. 494 on account of profits for the years 1272 and 1273 (Fusli). Thereafter from the year 1274 (Fusli) the defendant and his heirs shall have no claim except to his villages and *vice versa*. The plaintiff and the defendant are to enjoy waters, forests, lands, pounds, etc., lying in their respective shares. The defendant shall be responsible to pay (revenue) to Government. Plaintiff shall have no concern. On settlement being finally effected the defendant shall be responsible for payment of the revenue assessed. We, the parties, accept this decision of the arbitrators. We shall act up to the conditions above laid down."

Shortly afterwards Loknath became dissatisfied and appealed to Mr. Chisholm, the Deputy Commissioner, who gave judgment on 15th December 1864. He describes Loknath's proceedings as an appeal to set

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aside the agreement, and to have a fresh inquiry into the share of profits to which he is equitably entitled. His decision is—

"I see no reason for cancelling the agreement mutually entered into by the parties because at present no indisputable data exist on which a more [111] satisfactory finding could be based. It may be true that special facts have been concealed by defendant, and that the real rental of villages has not in all cases been stated, but if a fresh inquiry was ordered similar pleas might be brought forward. The best arrangement seems to me to uphold the agreement and to allow the parties the option at the regular settlement to claim a fresh adjudication based on the full information obtained from the detailed settlement proceedings."

Accordingly he dismissed the appeal.

The terms of the settlement came to be decided by the same Mr. Chisholm, who was then Settlement Officer. Loknath renewed his claim to a half share of the talukh. Badrinath offered to allow to Loknath for the period of the new settlement the sum of Rs. 1,196 for maintenance in lieu of the 11 villages. Mr. Chisholm's decision was given on 31st October 1867. There are two versions of it in the record; their Lordships follow the official translation in p. 110. After giving an opinion that a talukhdari estate is not divisible according to the ordinary rule of heirship, he refers to the litigation of 1862 and 1864 up to the date of the compromise. He says the villages then came to Loknath as "mukasa," a word, which, according to Wilson's glossary, imports a holding either rent free, or by the State of its own State property. He continues:—

"After the filing of this agreement the execution proceedings closed on the 29th October 1864. But after the decision Loknath objected, and being dissatisfied with the agreement, appealed to the Commissioner. The appeal was dismissed by that Court on 15th December 1864, and the parties held possession up to date under the terms of the agreement."

He goes on to show how Loknath has profited by the increased value of the land, while Badrinath has borne the increased jama. He concludes thus:—

"In reality by virtue of and after the agreement he has not been a loser but a gainer to a great extent. Yet he claims a half share. Until the previous agreement is cancelled this claim of Loknath is in my opinion altogether groundless, because what he gets according to his agreement is quite enough for his maintenance. Besides that I am not in favour of shares being apportioned in a talukhdari. As regards the previous orders of the Settlement Department about this dispute I made a reference to the Settlement Commissioner in order to have the matter of proprietorship cleared up, and in reply thereto a fresh decision was permitted. It is therefore desirable to decide the matter in accordance with previous possession [112] and custom. That is to say all the talukdhari rights should remain with the talukhdar and arrangements for maintenance of his brothers, &c., may be made separately.

"It is therefore ordered that the entire talukhdari right of talukh Tarenga be awarded to the present holder Badrinath, tahuddar and clear provision for the maintenance of brothers, &c., be laid down in the administration paper of Tarenga. Loknath will continue to hold the villages that are in his possession without payment of revenue."

This is the decision on the controversy which, in 1864, Mr. Chisholm postponed in order to obtain the fuller light of the settlement inquiry. In 1864 he intimates that Loknath, who was the party seeking to disturb the compromise, might succeed, if he showed unfair dealing by the talukhdar.

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In 1867 he holds that no such case has been shown. "What he gets according to his agreement is quite enough for his maintenance." He does not so much as discuss Badrinath's proposal to substitute an allowance for the term of settlement in lieu of the villages. He decides, he says, in accordance with possession and custom; giving the talukhdari as a whole to the talukhdar, but maintaining Loknath in his possession of the villages. That is to uphold the compromise as against both parties, though its effect in three years had been to increase Loknath's income and the talukhdar's payment of jama.

Loknath was dissatisfied with the decision and appealed to the Commissioner, Mr. Balmain, who affirmed it on the 28th February 1868.

During this settlement inquiry an administration paper or wajib-ul-arz was compiled for the talukh. It is set out at length in the record. It bears date 24th May 1867 and (apparently in anticipation of the settlement actually concluded) opens thus :—

"Special Administration Paper of the village of Tarenga tehsil and district Bilaspur."

"I am Badrinath son of Manohar Sao Bania tahuddar malguzar resident of Tarenga tehsil and district Bilaspur.

"Whereas the new settlement of this village under Act IX of 1833 for twenty years commencing with the 1st July 1867 and ending with June 1887 corresponding with Sambat 1924 to Sambat 1943 on a uniform revenue of Rs. 200 per annum has been effected with me before the Settlement Officer of the Bilaspur District, I hereby agree to act up to the following conditions until expiry of the period of settlement and further revision."

[113] Then comes Chapter I. headed "Acquisition of the Zemindari." It contains a blank form for the description of a village, and then continues :—

"This village has long since been in our family. Now, at the present settlement, inquiry in respect of rights to this village having been made, the proprietorship of the village of Tarenga, along with the rest of the talukha, was conferred upon me by order, dated 31st October 1867, and the villages of Amakoni, Tilkari, Turma, Buchipar, Achanakpur, Kesla, Datrenga, Datrengi, Madhuban, Lamti and Godhi were given in lieu of malikana to the claimant, Loknath, free of revenue, which was made payable by me. He shall hold possession thereof so long as the village remains in my family. My real brothers Baijnath and Kedarnath shall get Rs. 250 each in cash. With these exceptions nobody else shall have any concern with the talukha. I am myself the owner of the whole talukha."

It has been contended at the bar that the passage just quoted is all subject to the opening statement by Badrinath, and is open to alteration at future settlements. The construction is inapplicable to a statement of the acquisition of the zemindari and of the title of the talukhdar, which nobody, least of all Badrinath, would contend to be alterable on future settlements; and it is equally inapplicable to fixed interests of sub-proprietors. Nor can the expression "as long as the village remains in my family" be cut down to mean "during the term of settlement." Nor has the term "malikana" anything to do with maintenance. It indicates ownership of some kind; and if the villages were assigned, as Loknath contends, by way of compromise of his larger claim of joint ownership, which at the date of the wajib-ul-arz had been affirmed by one set of

officers and had not been rejected by Mr. Chisholm, except as being barred by the compromise itself, the expression used "in lieu of malikana" is well enough adapted to express that arrangement. The reference to future settlements is accounted for by the fact that the principal part of the document refers to details of value and management whose nature is alterable with time.

In December 1867 and in succeeding months formal sanads were issued by the Chief Commissioner Sir Richard Temple, and countersigned by Mr. Chisholm as Settlement [114] Officer, for the purpose of vesting in Badrinath the formal and legal title to the villages belonging to the talukh. The following is the sanad relating to the village of Datrenga, one of the eleven:—

"113 District.

"Under the authority of Government, and by virtue of this sanad, proprietary rights and ownership in mouzah Datrenga talukh Tarenga of the Bilaspur District are vested in Badrinath, son of Manohar Sao Banee, and his heirs and assigns, according to the boundaries defined at the regular settlement, subject to the payment of such Land Revenue and other cesses, as may from time to time be assessed according to the terms of settlement and to the conditions specified in the administration paper and other settlement records.

"(Signed) R. TEMPLE."

In this way the statement of Loknath's rights in the wajib-ul-arz became part of the title by which the plaintiff in the suit holds his talukh.

So matters continued during the settlement of 1869-1889. The only material dispute related to local cesses, as to which it was held in Badrinath's favour that they should be defrayed by Loknath.

On the occasion of the new settlement of 1889 it was found that the value of the land, and consequently the demand of the Government for jama, had risen very largely. Using round numbers, the annual net profits of the talukh had increased from Rs. 5,700 to 22,000, the profits of Loknath's villages from Rs. 1,900 to 5,700, and the jama from Rs. 930 to Rs. 3,800. The talukhdar contended in effect that he ought not to pay more jama than the amount charged in 1869, and that Loknath was entitled to nothing from the 11 villages beyond a maintenance calculated at the rate of 1869, and stated by the talukhdar to be Rs. 1,581. After some differences of opinion among the Revenue officers the case was referred to the Governor-General in Council, who pointed out that the question was one of strict law, depending on the agreement of 1864. Thereupon the talukhdar instituted this suit, praying relief according to his view as just stated.

Though the Civil Judge held, as above stated, that the decree of October 1864 embodying the compromise is the basis of [115] Loknath's rights, he went on to hold nevertheless that it was swept away by Mr. Chisholm's decision of October 1867, and that thenceforward Loknath had no right whatever except the ordinary right of a junior member of a joint family to maintenance, which might be enhanced or diminished from time to time. That he thought was a point for the Government to decide. He gave the plaintiff a decree for a declaration that the defendant's possession is in lieu of maintenance, and for the sum of Rs. 1,707-1-6, the amount of cesses for three years before suit. The rest of the claim he dismissed.

From this decree both parties appealed to the Judicial Assistant to the Commissioner, who considered that the sole question was the proper

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amount of maintenance. He first allowed the plaintiff to amend his plaint by asking a declaration "what amount of maintenance the defendant is entitled to, and on what conditions he should continue to hold his 11 villages." Then he remanded the suit to the Civil Judge for the trial of those questions.

At the hearing after remand he expressed his opinion that "Loknath should continue to hold his villages on the same terms as those on which he held them during the 20 years' settlement." His principal reason was that Loknath was not receiving so large a proportion of the profits as he had when the settlement of 1869 came into operation. He dismissed the suit with costs.

The talukhdar then appealed to the Judicial Commissioner, who considered that Loknath was getting an undue share and declared him to be entitled to the net increase of the profits of the 11 villages, but subject to pay the increased jama. His decree is dated 20th February 1896. A cross-appeal by Loknath was dismissed.

All these judgments, widely differing in result, proceed on the principle that the dispute between the parties is of the ordinary kind which occurs when the head of a family and a junior member cannot agree on the proper amount of maintenance. Their Lordships asked the respondent's Counsel whether there is any authority to show that Courts have jurisdiction to disturb [116] compromises or settled arrangements of a permanent character on the ground that they were originally based on claims for maintenance. No such authority was produced, and the principle adopted by the learned Judges below has no warrant in law unless it can be shown that Loknath's interest in the villages was of the variable character which belongs to an ordinary allowance for maintenance. To attribute that character to it is, their Lordships think, to misread the history of the case.

It would indeed be difficult so to view it if we had nothing before us but the decisions of Mr. Chisholm. In December 1864 he decided what has been called an appeal, which however was not an appeal but an attempt by Loknath to set aside a compromise. Mr. Chisholm saw no reason for setting it aside, because there was no evidence, such as he hinted might be forthcoming at the settlement inquiry, showing concealment of facts by the talukhdar. In effect he postponed the dispute to the more convenient season of the settlement. In his order of October 1867, during the settlement proceedings, he lays down that Loknath can have no claim until the agreement is cancelled, and for that there is no case because he has got enough. Besides that, he dissents from the opinion of his predecessors that the talukhdari is partible. It is, indeed, very probable that Loknath got a good bargain by effecting a compromise during the prevalence of an official opinion that the estate was partible, though he himself was dissatisfied with getting only 11 villages, while the talukhdar got the bulk of the estate, which was potentially, and soon became actually, of much greater value. But anyhow the bargain was maintained against the dissatisfaction of both parties.

But whatever doubts might occur on Mr. Chisholm's judgments, they are only part of the history, and must be read with what preceded and what followed. They were preceded by a decree for half profits ; an attempt to execute it ; fresh disputes ; a compromise which says that Loknath shall have 11 villages to possess, occupy and manage them just as he pleases, and that each is to hold possession of his own share, and which makes arrangements for the public burdens, for the debts of the estate

[117] furniture, buffaloes, apparently all matters that could be thought of. It is very difficult to suppose that such an arrangement was ever thought to be of a temporary character; and it is left in force by Mr. Chisholm. The transactions which accompany and follow the judgment of 1867 are even more emphatic and precise. For the wajib-ul-arz was settled at that time, and was followed by the sanads of 1867 and 1868, which incorporate it and make it impossible for the talukhdar to show title to the villages of the talukh without also showing Loknath's interest in 11 of them.

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Their Lordships are of opinion that the plaintiff is not entitled to any relief except as regards the cesses for the repayment of which he sued. The proper course will be to discharge all the decrees below except that of the Civil Judge of Bilaspur so far as it gives to the plaintiff the amount of cesses sued for. Instead thereof it should be declared that the talukh is vested in the plaintiff, subject to the right of the defendant to hold possession of the 11 villages on the terms specified in chap. I of the wajib-ul-arz of the 24th May 1867; and that, as between the plaintiff and the defendant, the plaintiff is liable for the Government jama, and the defendant for the local rates and cesses levied on such villages or on the talukh in respect of them. As the defendant has disputed payment of the cesses at least up to the Court of the Judicial Assistant, he should pay the due proportion of costs in the two first Courts. His appeal to the Judicial Commissioner must have been misconceived, seeing that the suit against him had been dismissed, and his appeal was rightly dismissed with costs. With these exceptions the respondent should pay the costs of all the proceedings in all the Courts. Their Lordships will humbly advise Her Majesty to pass a decree in accordance with the foregoing opinion. On this appeal the respondent wholly fails and he must pay the costs of it.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Watkins and Lempriere.*

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[118] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Davey, Sir Richard Couch and Sir Edward Fry.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

THE DEPUTY COMMISSIONER OF BARA BANKI (*Defendant*) v. RAM PARSHAD (*Plaintiff*). [21st and 22nd June and 8th July, 1899.]

Evidence Act (I of 1872), s. 34—Admissibility of books of account containing entries after transactions—Corroborative evidence.

By s. 34 of the Indian Evidence Act, 1872, the admissibility of books of account regularly kept in the course of business is not restricted to books in which entries have been made from day to day, or from hour to hour, as transactions have taken place. The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards, make them irrelevant.

The course of business in keeping the accounts in the office of a talukhdari estate was that monthly accounts were submitted by karindas at the head office where they were abstracted and entered in an account-book, under the date of

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entry, that being in some cases many days after the transaction of payment or receipt; but the entries were made in their proper order, on the authority of the officer whose duty it was to receive or pay the money. *Held*, that the entry in the account-book was admissible as corroborative evidence of oral testimony to the fact of a payment, for what it was worth, objection being only to be made to its weight, not to its relevance under s. 34.

The opinion expressed in the judgment in *Munchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Co.* (1) against the reception of an account book containing an entry not made at the time of the transaction, was not approved.

[F., 13 C.L.J. 139 (142)=8 Ind. Cas. 81; R., 25 B. 616 (624); 10 N.L.R. 44=23 Ind Cas. 893.]

APPEAL from a decree (31st July 1895) of the Judicial Commissioner's Court in favour of the plaintiff, reversing a decree (6th September 1892) of the Deputy Commissioner of Lucknow, who dismissed the suit with costs.

This appeal related to the second of two suits heard together, which were brought to charge with liability the estate of the late Raja Mahpal Singh upon two mortgage bonds, one dated the 4th September 1880, securing Rs. 7,000 at 12 per cent. for one year, and the other, dated the 20th January 1881, for the like period, securing a further sum of the same amount at 15 per [119] cent. The suit on the later bond was brought on the 13th April 1887, and the other suit on the earlier one, the subject of this appeal, on the 26th August 1887.

The Raja died on the 8th October 1882, leaving a widow Rani Chubraj Kunwar, and his infant son, Raja Pirthi Pal Singh. The family estate, Surajpore, was represented by the defendant, appellant, as manager for the Court of Wards on behalf of the infant. Both suits were brought by the manager of the Keyestha Patshala, a school at Allahabad, founded by the late Munshi Kali Parshad, who died in 1886, four years after the death of the Raja, whose vakil this Munshi had been for many years.

The facts of the case are stated in the judgment of their Lordships, and the circumstances under which the two suits came to be heard together, when it was not disputed that the only question between the parties was whether the money had been paid by the Raja to Kali Parshad. On this question of payment the point arose, which was brought forward on this appeal, whether the Court, under s. 34 of the Indian Evidence Act, 1872, could receive in evidence, as being relevant, books of account kept in the estate office of the Surajpur talukhdari according to the usual course of business, and containing entries made on the authority of officers whose duty it was to receive and pay money, although the entries were not made at the date of the transactions.

Section 34 enacts: "Entries made in books of account regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire, but such evidence shall not alone be sufficient to charge any person with liability."

The District Judge, having admitted an account-book which he considered to be relevant evidence within that section, found the payment proved, and dismissed the suit with costs. The account book in question was termed the "roshanbahi" on this record.

On the plaintiff's appeal, the Additional Judicial Commissioner gave the following opinion in which the Judicial Commissioner concurred:—

[120] "It was contended for the plaintiff that the roshanbahi was not proved to be a genuine account-book of the Surajpur estate; that the

(1) 4 B. 576.

entries in it were not admissible in evidence, as it was not regularly kept in the course of business, that it was not an original account-book, and for that reason also was inadmissible in evidence.

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"I think that the evidence of Nand Kumar, Sarju Parshad, a late dewan of the Surajpur estate, and Lal Bahadur, a late mohurrir of the estate, is quite sufficient to prove that the roshanbahi is a genuine account-book of the estate, more particularly as the plaintiff did not call Babu Tara Parshad, to whom it is said in the letter of Mukarram Husain to Munshi Hanuman Parshad, dated the 7th April 1887, the accounts had been shown. The objection that the roshanbahi is not regularly kept in the course of business and therefore the entries in it are not relevant, is based upon s. 34, Indian Evidence Act, and the case of *Munchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Co.* (1) it being urged that the roshanbahi was just such a book of account as was held by Mr. Justice West in that case to be one not regularly kept in the course of business. On the other hand it was argued, that so long as a book of account was kept regularly, the system on which it was kept was of no importance, and it could not be said that because it was the practice to enter certain transactions when they came to the knowledge of the Head Office under the date of entry, the roshanbahi was not regularly kept in the course of business, it not being possible to make the entries in any other way. Reference was made to *Reg.* v. *Hanmanta* (2).

"It appears to me that the contention for the appellant must be accepted. In the case decided by Mr. Justice West, that learned Judge defines a book of account, regularly kept in the course of business, within the meaning of s. 34, Indian Evidence Act, to be only a book of account which is entered up from day to day or hour to hour as the transactions take place. Now, it seems clear that the roshanbahi is not such a book. Entries may have been made daily in the book, but in many instances they were not made as the transactions entered took place. On the contrary, many transactions are entered which took place many days before they were entered. The relevancy of a book of account under s. 34 does not depend merely on the fact that entries are made in it from day to day. The book must be regularly kept in the course of business. The case cited for the respondents is not in point. It was decided in that case that entries in a book of account, if regularly kept in the course of business, are admissible whether or not they have been made by, or at the dictation of, a person who had a personal knowledge of the truth of the facts stated. The objection taken is not that entries in the roshanbahi were not made by, or at the dictation of, a person [121] having a personal knowledge of the truth of the facts stated, but that the book was not regularly kept in the course of business, *i.e.*, that entries were not made as the transactions took place, but subsequently. It is immaterial that certain transactions could not be entered as they took place. Some system should have been adopted under which every transaction that took place could have been entered in a book of account as it took place.

"In my opinion the entries in the roshanbahi are not relevant under s. 34, Indian Evidence Act, that book of account not being regularly kept in the course of business, within the meaning of that section. It was not contended that the entries relied on were admissible under any other part of the Indian Evidence Act.

(1) 4 B. 476. (2) 1 B. 610.

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"In considering therefore whether the debt claimed under the bond, dated the 20th January 1881, has been paid, the entries relied on cannot be referred to."

The appellate Court then found the payment not to have been proved, and in the suit of the 26th August 1897 decreed the claim.

Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the appellant, in that part of their argument which referred to s. 34, argued that the main reliance in this case was to be placed upon the oral evidence of payment given by Nund Kumar, an old servant of the estate, which was corroborated by a roshanbahi, or account-book, proved to have been a genuine account book of the estate, containing an entry of Rs. 9,000. This sum was attributed by that witness to the bond in suit. The appellate Court below had wrongly refused to admit this book on the ground that it was not relevant within the meaning of s. 34, the entries made therein not having been made from day to day or from hour to hour, as the transactions took place, but having been made when some period had elapsed. That some delay should occur was quite consistent with the book having been kept in a due course of business, the karindas of the estate being in the habit of submitting monthly accounts, which were abstracted and entered in the roshanbahi under the date of entry. Disbursements might be made at a distance from the office of the estate, at Hathaunda, where the book was kept. The judgment of the Bombay High Court, referred to by the Additional Judicial Commissioner in *Manchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Co.* (1), was upon [122] this point erroneous. The requirement of s. 34 was only to the effect that a book, to be relevant evidence, must have been kept in a due course of business, and did not insist that the entries therein should be made from day to day. The time of the making of the entry might be important in a high degree, in regard to its value as evidence, but, according to the section, did not affect its admissibility.

Mr. *H. Cowell*, and Mr. *W. Colvin*, for the respondent, argued that the judgment of the appellate Court below was right in excluding the roshanbahi. The entries therein had not been made at the dates of the transactions of which they purported to be memoranda, but had been made afterwards at the dictation of karindas. The reason against the admission of this book, as relevant evidence within s. 34, was that it was not kept "regularly in the course of business," where regularity was essential. The roshanbahi was a mere day book, and its value consisted in its daily record of transactions, or its entries at no distant date. Again, in this instance, the amount entered was in excess of the amount due at its date, and no entry had been referred to as showing what was done with the balance. Thus the entry on which the appellant relied was not sufficiently identified with the mortgage debt of which it was sought to prove payment.

Mr. *J. H. A. Branson* replied.

Afterwards, on the 8th July, their Lordships' judgment was delivered by—

JUDGMENT.

SIR R. COUCH.—The suit, which is the subject of this appeal, was brought on the 26th August 1887 by Munshi Hanuman Parshad, manager and superintendent of the "Kayestha Patshala." Allahabad, against Rani

(1) 4 B. 476.

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Chabraj Kunwar, widow of the late Raja Mahpal Singh and Raja Pirthi Pal Singh, his son, a minor, under the guardianship of his mother the Rani, on a mortgage-bond, dated 4th September 1880, for Rs. 7,000, said therein to have been borrowed from Hanuman Pershad, manager of the Patshala, out of the Patshala's funds, and to be repaid with interest to the manager for the time being of the Patshala. The sum claimed to be due for principal and interest was [123] Rs. 15,141-2-10. After the filing of the plaint the estate of the minor came under the management of the Court of Wards and the appellant was made a defendant in the suit. Previously to this suit being brought another suit between the same parties had, on the 13th April 1887, been brought on a similar bond, dated the 20th January 1881, for Rs. 7,000, in which the sum claimed for principal and interest was Rs. 13,546-14-8. On the 5th January 1889 the respondent on the death of Hanuman Parshad before the trial was made plaintiff in the suits in his place. The suits were tried together, it being agreed that evidence taken in the suit first instituted, which might be material to the other suit, should be evidence in that suit. Both were dismissed by the District Judge, his full judgment being given in the first suit.

The defence in each of the suits was that the lender of the money was not the Patshala but Munshi Kali Parshad, a deceased vakil who used to practise at Lucknow, and who managed the transactions of the Patshala at Lucknow till his death, having endowed it with considerable property, and that the money had been repaid to him by the Raja. After the examination of the plaintiff had been finished his pleader stated in answer to a question by the District Judge that if the defendants proved that the monies due on the bonds were paid by the Raja to Kali Parshad his client was willing to treat such payment as made to himself. This was the only question that had to be decided. The Raja died on the 8th October 1898 and Kali Parshad died on the 10th November 1886. On the 3rd April 1887 Hanuman Parshad, as manager or president of the Patshala, sent a letter to the Rani demanding that the bonds should be paid, or that some arrangement should be made for their payment, and saying that he had sent Tara Parshad, the accountant of the Patshala, in order that he might bring a reply without delay. To this letter Muharram Husain, the karperdaz of the Surajpur (the Raja's) estate replied on behalf of the Rani on the 7th April by a letter in which he said that the money due on the bonds had been paid to Kali Parshad, that the accounts in the office of the estate had been shown to Tara Parshad and that Kali Parshad was the old vakil of the estate and consequently had not been asked to return the bonds or give receipts. On the 13th April [124] 1887 the suit on the bond of 20th January 1881 was brought. It did not appear why the suit on the bond of the previous 20th September was not brought until August 1887.

The case of the defendants, as regards the payment of the bond of the 20th January 1881, is that the Raja received on the 26th April 1882 from the Bank of Bengal at Lucknow Rs. 27,010-5-3, part of a lakh of rupees borrowed from Mr. Jackson, and that out of this sum he paid Kali Parshad Rs. 16,406, which included the principal and interest due on the bond. It was not disputed that the Raja borrowed a lakh of rupees from Mr. Jackson and that he received Rs. 27,000 and odd from the Bank of Bengal at Lucknow on the 26th April 1882 as part of this loan, and that Kali Parshad deposited Rs. 17,000 in the London and Delhi Bank on the 1st May 1882. The principal witness for the defendants was Nand

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Kumar, a servant of the Surajpur estate, who had been in its service for 15 or 16 years. If his evidence is true this bond was paid. The defendants relied upon entries in a roshanbahi or day-book of the Surajpur estate and upon a list of the debts of the Raja made soon after his death. This list, which was produced, contained an entry of Rs. 20,000 due to "Hanuman Parshad, the manager of Kayestha Patshala," but there was no entry in it of either of the bond debts. Nand Kumar deposed that he made it out of the papers of the estate, and that Kali Parshad dictated the item of Rs. 20,000; he gave the list to Kali Parshad, and he filed it in the Tehsildar's Court; that Kali Parshad read the list in Nand Kumar's presence, and made no objection as to any debt due to the Patshala having been omitted ; the Rani repaid the Rs. 20,000.

As to the entries in the roshanbahi their Lordships accept the statement as to it in the judgment of the Judicial Commissioner's Court. "This book was kept at the office of the estate at Hathaunda, and in it the money recived and disbursed on behalf of the estate was entered. Receipts or disbursements of money at any other place but Hathaunda were entered when the receipt or disbursement was brought to the knowledge of the office under the date of entry. For example, the karindas of the estate used to submit monthly [125] accounts, which were abstracted and entered in the roshanbahi under the date of entry. Again, if the Raja visited Lucknow or any place, all money received or disbursed on his behalf by his servants was entered on his return to Hathaunda under the date of entry. That is to say, a servant of the estate might during a certain period receive or pay money for his master, and the receipts or payments for that period would be entered when the servant rendered an account perhaps many days after the date of the receipts or payments, and when entered would all appear under the date of entry." It should be added that these entries were made in their proper order on the authority of the officer whose duty it was to receive or pay the money. The District Judge says in his judgment that this book was kept in the way in which talukdars' accounts are kept, and the judical Commissioner's Court says that the evidence of Nand Kumar, Sarja Parshad, a late dewan of the Surajpur estate, and Lal Bahadur, a late mohurrir of it, was quite sufficient to prove that the roshanbahi is a genuine account-book of the estate ; but on the authority of a decision of the Bombay High Court in *Munchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Co.*(1) it held that the entries were not relevant under s. 34 of the "Indian Evidence Act," the book not being regularly kept in the course of business within the meaning of that section. In the case referred to the learned Judge held that the words in s. 34 "books of account regularly kept in the course of business" mean books entered up from day to day or from hour to hour as transactions take place. Their Lordships are unable to approve of this decision. It gives a much too limited meaning to s. 34. If it were correct, merchants' and bankers' books regularly kept would in many cases be excluded from being used as corroborative evidence. The time of making the entries may affect the value of them, but should not, if not made from day to day or from hour to hour, make them entirely irrelevant. Notwithstanding the rejection of the entries the appeal Court held on the other evidence in the case that the defendants had established that the Raja paid Kali Parshad the [126] amount due on the bond of the 20th January 1881, agreeing with the finding of the District Judge as

(1) 4 B. 476.

to this bond, and they dismissed the appeal in the suit on it. But as to the bond of the 14th September 1880 they held that the entries not being relevant the proof of payment rested entirely on the evidence of Nand Kumar and the inference to be drawn from the bond debt not being entered in the list, and this being the only admissible evidence on the point, the defendants had failed to prove that the Raja paid that bond to Kali Parshad. Their Lordships being of opinion that the entries were admissible to corroborate Nand Kumar, they think the payment of this bond to Kali Parshad was also proved, and they will humbly advise Her Majesty to affirm the decision of the District Judge, to reverse the decree of the Court of the Judicial Commissioner and to order the appeal to it in the suit on the bond of the 14th September 1880 to be dismissed with costs. The respondent will pay the costs of this appeal.

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For the appellants: The *Solicitor, India Office.*

Solicitors for the respondent: Messrs. *Ranken, Ford, Ford and Chester.*

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27 C. 126 = 3 C.W.N. 601.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

CHAROOBALA DABEE (*Petitioner*) v. BARENDRA NATH MOZUMDAR (*Opposite Party*).* [30th May, 1899.]

Revision—High Court's power of Revision—Presidency Magistrate, Proceedings of—Order for further inquiry—Criminal Procedure Code (*V of* 1898), *ss.* 423. 435, 439—*Charter Act* (24 *and* 25 *Vict., C.* 104), *s.* 15—*Letters Patent, High Court,* 1865, *cl.* 15.

The High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate by reason, not of s. 28 of the Letters Patent, 1865, but of s.15 of the Charter Act (24 and 25 Vict., C. 104). That section has always been interpreted in a very extended [127] meaning, so as to give ample powers of superintendence, that is to say, powers of revision over proceedings of subordinate Courts. But the High Court has no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal or discharge passed by a Presidency Magistrate.

Colville v. *Kristo Kishore Bose* (1) dissented from. *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (2) referred to.

A Presidency Magistrate acting under s. 203 of the Criminal Procedure Code dismissed a complaint on the report of the police without examining the complainant, and without finding on such examination that there was no sufficient ground for proceeding. The High Court, acting under s. 15 of the Charter Act, ordered a further inquiry to be made into the matter of the complaint.

[Diss., 27 B. 84 (88); 28 C. 652 (668) (F.B.); 36 C. 994 = 11 C.L.J. 50 (51) = 13 C.W.N. 1221 = 10 Cr.L.J. 385 = 3 Ind. Cas. 861; R., 28 C. 709 (717); 12 Cr.L.J. 50 = 8 Ind. Cas. 1161 (1164) = 33 P.R. 1910 Cr. = 57 P.L.R. 1910; 1913 M.W.N. 728 = 14 Cr.L.J. 529 = 21 Ind. Cas. 129 = 14 M.L.T. 200; 2 Weir. 255 (257); 25 M.L.J. 510 = 14 Cr.L.J. 633 = 21 Ind. Cas. 681; D., 35 C. 1036 N. = 9 Cr.L.J. 188.]

ON the 28th February 1899 a complaint was filed on behalf of the petitioner before the Presidency Magistrate, Northern Division, Calcutta, charging one Barendra Nath Mozumdar with the offences of criminal misappropriation and criminal breach of trust in respect of certain money, jewellery and documents. The Magistrate directed a police inquiry, but did not examine the complainant or her witnesses. Upon receipt of the

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* Criminal Revision No. 273 of 1899, made against the order passed by Syed Ameer Hossein, Presidency Magistrate, Northern Division, dated 25th March 1899.

(1) 26 C. 746. (2) 1 C.W.N. 49.

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police-report the Magistrate dismissed the case on the 7th March 1899 under s. 203 of the Criminal Procedure Code. The petitioner thereupon applied on the 10th March to the same Magistrate to revive the complaint on the ground that the order of dismissal was made in her absence and without the examination of herself and her witnesses; but the Magistrate held that, having once dismissed the complaint, he had no power in law to revive it without an order of further inquiry by the High Court. The petitioner moved the High Court on the 22nd March for a further inquiry; but her application was rejected. She then made another application to the same Magistrate for a revival of the case. The Magistrate made the following order on the 25 March: "Having once dismissed it, I can't revive this case under the ruling of the High Court, dated 16th September 1898, in the case of *Ram Kumar* v. *Ramji Dass* (1)." A rule was then obtained against this order from the High Court on the 13th April, calling upon the Presidency Magistrate "to show cause why an order directing further inquiry should not be passed in this case;" and the following memorandum was also **[128]** made: "At the hearing of this rule, the case of *Ram Kumar* v. *Ramji Dass* (1), dated 16th September 1898, referred to by the Presidency Magistrate as well as the case of *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (2) will be considered. The papers, relating to the previous application made by this petitioner on the 22nd March last, will also be put up."

Babu Boidya Nath Dutt, appeared on behalf of the petitioner.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows:—

JUDGMENT.

In this case the Presidency Magistrate discharged the accused, and a rule was granted to show cause why an order directing further inquiry should not be passed. When that rule was made, there was some uncertainty in regard to the powers of the High Court in this respect, because s. 437 of the Code of Criminal Procedure, which empowers this Court to make an order for further inquiry, is not made applicable to proceedings before a Presidency Magistrate. There was also another rule to the same purport, which had been granted by the same Bench, of which I was a member, and, under the terms of that rule, it was expressly stated that it would be considered whether this Court has not under s. 15 of the Charter Act powers to pass such an order. The rule in that case has been heard and dealt with by another Bench of this Court, who have held that such power is given to the High Court, as a Court of revision under s. 439 read with ss. 425 and 423. In cases which have come before me as a member of another Bench, I have expressed my opinion that such a power is not given to this Court as a Court of revision in respect of an order of discharge passed by a Presidency Magistrate, and, as I do not approve of the judgment in that case, and my brother Hill shares that opinion, it is necessary that I should state the ground upon which we do not agree with it.

Section 437 expressly gives to the High Court, the Sessions Judge and District Magistrate power to order a Magistrate to make a further inquiry, but it does not refer to the proceedings before a Presidency Magistrate. The Code of Criminal Procedure **[129]** throughout draws a distinction between Presidency Magistrates and other Magistrates, and

(1) Unreported. (See 24 C.W.N. 26.) (2) 1 C.W.N. 49.

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expressly refers to Presidency Magistrates wherever it relates to proceedings before them. The fact that this power is expressly given in respect of proceedings before other Magistrates, while there is no provision made in respect of proceedings before Presidency Magistrates, seems to show that the Legislature did not intend to deal with orders of discharge passed by Presidency Magistrates. But it has been held that the powers expressly conferred on the High Court and other Courts by s. 437 in respect of orders of discharge passed by Magistrates, not by Presidency Magistrates, can be exercised by the High Court in exercise of its powers of revision under the Code of Criminal Procedure, and ss. 439, 435 and 423 of the Code have been referred to as authority for this. We do not agree in this view. Section 435 enables certain judicial officers to send for records of subordinate Courts for the purpose of satisfying themselves as to the "correctness, legality or propriety" of such proceedings. But it confers no powers in regard to the correction of errors so found. And although it may be conceded that the proceedings of a Presidency Magistrate, in which an order of dismissal or discharge may have been passed, may be thus sent for, unless some power to act in revision be conferred, although errors may be pointed out for future guidance, nothing further could be done. Powers of revision are, however, expressly given by other sections. Section 439 confers on the High Court as a Court of revision all the powers of an appellate Court under s. 423. But s. 423 does not enable a Court of appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed. Section 423 confers a power to direct further inpuiry only in respect of a case of an appeal from an order of acquittal, and that this power is so limited is shown by an express enactment in s. 437 to provide for such orders being passed.

Under such circumstances we are not disposed to agree with the view expressed by another Bench of this Court in the case of *Colville* v. *Kristo Kishore Bose* (1), in respect to the application [130] of the Code of Criminal Procedure. That was a case of rule granted by a Bench of which I was a member, and it was expressly stated that it would be considered whether this Court could exercise the power in question under s. 15 of the Charter Act. The learned Judges before whom that rule was argued have apparently misread that order, and have considered that reference was made to s. 15 of the Charter, that is of the Letters Patent, whereas it expressly referred to s. 15 of the Charter Act, and therefore acting under this misapprehension the Judges considered that there was some mistake in the order, and that the reference should have been properly made to s. 28 of the Letters Patent. In the view which we take regarding the application of s. 28 of the Letters Patent, we are not inclined to agree with the learned Judges that that section in any way applies to a case such as the present, and we are not aware that there is any authority for this. But, dealing with this rule as it has been argued before us, and as it was intended that it should be argued by the note made when the rule was granted, we think that this Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate by reason of s. 15 of the Charter Act. That section has always been interpreted in a very extended meaning so as to give ample powers of superintendence, that is to say, powers of revision over proceedings of subordinate Courts, and we may refer as a case in

(1) 26 C. 746.

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which a similar opinion was expressed to the case of *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (1). We, therefore, hold that in such a case as that now before us the Court can act as a Court of revision under s. 15 of the Charter Act, and therefore, although not on the grounds stated in the rule to which reference has been made, we come to the same conclusion as was then arrived at. It is consequently unnecessary to refer this difference of opinion to a Full Bench. On the merits of this case, the rule should, in our opinion, be made absolute. The Presidency Magistrate, acting under s. 203, has dismissed this complaint on the report of the police, but he has done so without examining the complainant and without finding on the examination of the [131] complainant that there is no sufficient ground for proceeding. There will, therefore, be a further inquiry made into the matter of the complaint.

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27 C. 131=4 C.W.N. 201.

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Pratt.

AVERAM DAS MOCHI (*Petitioner*) *v.* ABDUL RAHIM (*Opposite party*).*
[23rd August, 1899.]

Workman's Breach of Contract Act (XIII of 1859)—Breach of contract by workmen—Trial—Procedure—Criminal Procedure Code (V of 1898), s. 370.

In the trial of a case under the Workman's Breach of Contract Act (XIII of 1859) the Magistrate is not bound to frame his record in accordance with the provisions of s. 370 of the Criminal Procedure Code.

It is doubtful whether a proceeding under the first clause of s. 2 and under s. 3 of Act XIII of 1859 is a criminal proceeding. There is no *offence* committed and there is no *accused*. The provisions of s. 370 of the Criminal Procedure Code are, therefore, inapplicable to a case of this nature.

[R., U.B.R. (1902) 3rd. Qr. Workman's Breach of Contract Act, 1.]

THE petitioner entered into an agreement with the opposite party for working under him as a *durzi*, but he broke the terms of the agreement and went to work under another employer. The opposite party thereupon complained against the petitioner under s. 1 of the Workman's Breach of Contract Act (XIII of 1859), and the Magistrate under s. 2 of the Act ordered the petitioner to return to his work, and under s. 3 of the Act directed him to enter into a recognizance in the sum of Rs. 50 for the due performance of the order. The petitioner moved the High Court, and obtained a rule to show cause why the above order should not be set aside and the case retried.

Babu *Dasarathi Sanyal*, for the petitioner.

The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

JUDGMENT.

This is a rule to show cause why an order of a Presidency Magistrate passed under Act XIII of 1859 should not be set [132] aside and the case retried. The order is under s. 3, directing the defendant to give a recognizance in the sum of Rs. 50 to return to his work. The

* Criminal Revision No. 564 of 1899 against the order passed by Syed Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 28th June 1899.

(1) 1 C.W. N. 49.

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petitioner is a *durzi*, who, it is said, entered into a stamped agreement to work for the opposite party. He left him to work for another employer, who gave him higher pay. The opposite party accordingly complained against him under s. 1 of the Act. The Magistrate under the first clause of s. 2 ordered him to return to his work, and under s. 3 directed him to execute the recognizance mentioned above.

The learned pleader, who appears for the petitioner, urges (1) that the evidence has not been properly recorded; and (2) that the Magistrate has written no judgment. He, however, has not been able to show us any section of Act XIII of 1859, or of the Criminal Procedure Code, prescribing how evidence in a case of this nature should be recorded or requiring a judgment to be written. He cited two cases—*Pallard* v. *Mothial* (1) and *Queen-Empress* v. *Indarjit* (2)—in the former of which it is ruled that inquiries under s. 2 of Act XIII of 1859 cannot be made summarily, while in the latter it is held that offences under s. 2 of Act XIII of 1859 *can* be tried summarily. These cases are, therefore, in direct conflict. The former of them, while laying down that such cases cannot be tried summarily, does not explain how they are to be tried, except that, it is said, they should be conducted "with care and patience." The latter is no guide to us in this rule, as it applies to Mofussil Magistrates and not to a Presidency Magistrate. We are accordingly unable to accede to the learned pleader's contention that the Magistrate was bound to frame his record in this case in accordance with the provisions of s. 370 of the Criminal Procedure Code.

Sub-section (3) of s. 2 of the Code of Criminal Procedure prescribes that "the provisions of this Code shall apply to all proceedings instituted after the commencement of this Code." This must mean *criminal* proceedings, otherwise the Code would be applicable to all civil proceedings, which cannot [133] be. Now, is a proceeding under the first clause of s. 2 and under s. 3, Act XIII of 1859, a criminal proceeding? It may be that an order passed under the second clause of s. 2 of the Act by which a workman may be imprisoned for three months is a criminal proceeding, but it seems doubtful if the order in this case, which is one not under the second clause of s. 2, can properly be so called.

Further, the provisions of s. 370 appear inapplicable to a case of this nature, (1) because no *offence* has been committed; and (2) because there is no *accused*.

Finally, there would appear to us to be no merits in the applicant's case. The order of the Magistrate shows that the complainant and one witness were examined. They proved the execution of the agreement by the petitioner. It is not denied that he has broken this contract or that he is a workman to whom the Act is applicable. It would accordingly seem that he is liable to be called upon under s. 3 to execute a recognizance, and we understand he has executed the recognizance required of him.

In these circumstances it seems to us that this is not a case in which it is necessary for us to exercise our discretionary power of revision. We discharge this rule.

S. C. B.

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(1) 4 M. 234. (2) 11 A. 262.

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CRIMINAL REFERENCE.

27 C. 133.

27 C. 133.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

QUEEN-EMPRESS *v.* MAKIMUDDIN.* [26th July, 1899.]

Reformatory Schools Act (*VIII of* 1897), ss. 8, 11, 16 *and* 31—*Rule framed by the Local Government—Youthful offender—Evidence of age—Order not properly passed—Penal Code* (*Act XLV of* 1860), s. 83.

If an order for detention in a Reformatory School in substitution for transporation or imprisonment be not properly passed, a Court is not debarred by s. 16 of the Reformatory Schools Act (VIII of 1897) from altering or reversing such order.

[134] A boy of about 9 years of age was found in the grounds of the residence of the Commissioner of Patna at 3 A. M. in the morning with a brass *lota* in his hand. He was tried summarily and without any preliminary inquiry as to the age of the boy being made was sentenced to three months' rigorous imprisonment, or in lieu thereof to be detained in a Reformatory School for seven years. *Held*, the accused did not come within the definition of "youthful offenders" as given in the Rules (1) framed by the Local Government under s. 8 of the Reformatory Schools Act; and the offence of the accused being his first offence the case should have been dealt with under s. 31 of the Act.

It is not that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender, but it is generally desirable that there should be some reliable evidence on the point and especially when it is necessary to determine the period of detention.

The age of the accused being under twelve years the Magistrate should, considering the provisions of s. 83 of the Penal Code, have found that the accused had attained sufficient maturity of understanding to judge of the nature and consequences of his act.

[F., 1 L.B.R. 68 (69); 5 M.L.T. 296=9 Cr. L.J. 392=1 Ind. Cas. 807.]

REFERENCE under s. 438 of the Criminal Procedure Code by the Sessions Judge of Patna. The following were the material portions of the letters of reference:—

"In this case it appears that a boy of about 9 years of age was found in the compound of the Commissioner of Patna's residence at 3 A. M. one morning with a brass *lota*. It is said that he was offering the same for sale. He was suspected and was taken to the thannah where it was found that the *lota* in question belonged to one of the constables there. Then a first information was drawn up and the boy was sent up charged with theft. The case was made over to the Deputy Magistrate, Babu Ram Anugrah Narayan Sing, for trial on 3rd June. The case was tried summarily, and the accused was sentenced to three months' rigorous imprisonment or in lieu thereof to be detained in a Reformatory for 7 years. It appears to me that the Deputy Magistrate did not make any preliminary inquiry as to the age of the youthful offender as required by s. 11 of the Reformatory Schools Act (VIII of 1897). It also appears to me that in other respects the order is improper, as the facts scarcely indicate that the boy is a proper subject for a Reformatory School. If the boy had real criminal tendencies he would not have acted as he had done, *viz.*, take a *lota* from under the bed of a constable and then try to sell it at 3 A. M. in the Commissioner's compound. I think that the Deputy Magistrate should have made a preliminary inquiry as to the boy's age, and that then he should have acted as directed by s. 31 of the

* Criminal Reference No. 145 of 1899, made by G.W. Place, Esq., Sessions Judge of Patna, dated the 8th of July 1899.

(1) *Calcutta Gazette*, Part I, p. 226, 1st March 1899.

Act, *viz.*, either discharged the boy after due admonition or delivered him to his parent or his guardian on such guardian or relative [135] executing a bond to be responsible for the good behaviour of the youthful offender. I, therefore, recommend that the conviction be quashed and the sentence reversed, and that the case be sent back to the Deputy Magistrate to be dealt with under s. 31 of Act VIII of 1897."

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The explanation offered by the Deputy Magistrate who tried the case was as follows :—

"I have the honour to state that on a look of the boy I was satisfied that his age was about 10 years, so I did not make any further inquiry as regards the same by calling the boy's father or any medical officer. I noted his age in the record of the summary proceedings. If the learned Sessions Judge desires I may hold a further inquiry under s. 428, Criminal Procedure Code, by calling the boy's father and any medical officer. As the offence was committed at night I was of opinion that the offence was serious."

No one appeared at the hearing of the reference.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

JUDGMENT.

The Magistrate in a summary trial has convicted the petitioner of theft and has sentenced him to " three months' rigorous imprisonment, in lieu to undergo seven years detention in a Reformatory."

The Sessions Judge has referred this case to this Court for revision because there has been no inquiry or evidence taken to ascertain the petitioner's age, and, therefore, no proper finding that he is a youthful offender; and he has also observed that the case should have been considered under s. 31 of the Reformatory Schools Act (VIII of 1897) rather than as a fit case for an order for detention in a Reformatory School.

In explanation the Magistrate has stated "on a look of the boy I was satisfied that his age was about 10 years so I did not make any further inquiry."

Section 16 of the Act declares that no Court shall alter or reverse in appeal or revision any order passed with respect to the age of the youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment.

In this case there has been no order in respect of the age of the youthful offender. He has been summarily declared to be a youthful offender.

[136] We do not desire to be understood as holding that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender within the definition given in the Act, but we think that it is generally desirable that, when it is procurable, there should be some reliable evidence on the point, and especially when it may be necessary to determine the period of the detention which is limited to his attaining eighteen years of age.

But that is not the matter really raised in this case. The real question seems to be whether this boy should be detained at all in a Reformatory School. Now, although we are debarred by s. 16 of the Act from altering or revising an order for detention in a Reformatory School in substitution for transportation or imprisonment it must be an order properly so passed. Section 8 of the Act declares that the Local Government may make rules for defining what youthful offenders should be sent to Reformatory Schools having regard to the nature of their offences

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or other considerations, and among the Rules so made (see *Calcutta Gazette*, March 1, 1899, Part I, p. 226) it is declared that such youthful offenders shall be those "convicted of offences against property or any other offence showing dishonesty or depravity (1) in all cases, when they have been previously convicted of any such offence; and (2) on first conviction, when a brief term of imprisonment is considered an undesirable and inadequate punishment, or they are without proper parental or other control, or there is reasonable cause for supposing that they are being trained to, or are likely to relapse into, crime."

We cannot regard the offence of which the petitioner has been convicted, stealing a *lota* from the side of a sleeping man, as within these terms, or as the Magistrate describes it in the explanation a "serious" offence. It is admittedly also a first offence, and therefore it seems to come within s. 31, which apparently has been overlooked by the Magistrate. We accordingly set aside the order as not an order properly made and direct the Magistrate to proceed in accordance with the rules made by the Local Government.

[137] We also draw the attention of the Magistrate to s. 8 of the Indian Penal Code. He should, having regard to the age of the boy being under twelve years of age, find that the accused has attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on the occasion of his taking the *lota*. The fact that he offered it for sale very soon after taking it and in the same locality is remarkable, and would seem to throw some doubt whether he understood the nature and consequences of his act.

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27 C. 137.

CRIMINAL REFERENCE.

Before Mr. Justice Rampini and Mr. Justice Pratt.

QUEEN-EMPRESS *v.* NATU AND ANOTHER.* [6th September, 1899.]

Pardon—Criminal Procedure Code (*V of* 1898), *s.* 337 *and s.* 339—*Tender of pardon—Trial of person who, having accepted a pardon, has not fulfilled the conditions on which it was offered—Prosecution for giving false evidence—Sanction of High Court.*

When a pardon under s. 337 of the Criminal Procedure Code has been tendered to and accepted by any person in connection with an offence he should not be tried for any alleged breach of the conditions of his pardon or for any offence connected with that for which he has received pardon until the trial of the principal offence has been completed.

No prosecution for the offence of giving false evidence in respect of a statement made by a person who has accepted a tender of pardon should be entertained without the sanction of the High Court, as provided by s. 339, cl. (3) of the Code.

[**F.**, 32 M. 173=9 Cr.L.J. 571=2 Ind. Cas. 343; **R.**, 13 C.P.L.R. 123; **D.**, 24 M. 321 (324)=2 Weir 296.]

REFERENCE under s. 438 of the Criminal Procedure Code by the Sessions Judge of Rungpur.

The facts of the case appear from the following material portions of the letter of reference:—

"The three accused Natu, Kekar, and Sarafdi have been committed for trial by the Sub-Divisional Magistrate of Kurigram. It appears that

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* Criminal Reference No. 178 of 1899 made by A. E. Harward, Esq., Sessions Judge of Rungpur, dated the 25th of August 1899.

on the 6th May Sarafdi lodged an information before the police to the effect that one Besad had been murdered by Baden Sardar and others, and that the body had been buried by them in a certain dry tank. The police proceeded to the spot and found the body in the place indicated. The body was so far decomposed that the cause of death could not be ascertained at the *post mortem*.

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[138] "On the 19th June, while the police inquiry was still going on, Kekar and Natu made statements before the Sub-Divisional Magistrate of which the general effect was that the deceased was killed by Sarafdi and one Tariulla, and that the body had been buried by them in the dry tank with the intention of throwing suspicion on the other party.

"On the 29th June Sarafdi, Natu, and Kekar were sent up for trial by the police on a charge of murder. On that date, apparently before taking any other evidence, the Sub-Divisional Magistrate made a tender of pardon to Natu and Kekar. They accepted the pardon and were examined as witnesses, but made statements quite inconsistent with the statements previously made by them before the Magistrate. At the foot of each of their depositions the Magistrate recorded an order revoking the pardon. After revoking the pardon the Magistrate proceeded with the inquiry against all three accused jointly and has committed them all three for trial with a charge of murder against Sarafdi only and a charge under s. 194 of the Penal Code against all three accused and charge under ss. 201 and 202 of the Penal Code against Natu and Kekar.

"The orders which I recommend for revision are the orders revoking the pardons granted to Natu and Kekar and the subsequent order committing them for trial to this Court. It appears to me that these proceedings were illegal because the Magistrate had not at that stage of the case any jurisdiction to revoke the pardons. Section 337 (2) of the Criminal Procedure Code runs: 'Every person accepting a tender under this section shall be examined as a witness in the case.' I think these words clearly mean at the trial of the case and not merely at an inquiry prior to commitment. I think therefore that the law requires that Natu and Kekar should be examined as witresses at the trial of Sarafdi before the Court of Sessions.

"I would therefore recommend that the orders of the Magistrate revoking the pardons tendered to and accepted by Natu and Kekar be set aside, and that the commitment of Natu and Kekar be quashed, and that it be ordered under the provisions of s. 337 (3) of the Criminal Procedure Code that Natu and Kekar be detained in custody until the termination of the trial of Sarafdi by the Court of Sessions."

No one appeared at the hearing of the reference.

The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

JUDGMENT.

In this case the Magistrate has revoked the pardons tendered to Natu and Kekar and has committed them for trial to the Sessions along with Sarafdi, though not for murder with which Sarafdi is charged. We agree with the Sessions Judge that the Magistrate's procedure is wrong, and that it was premature to remove Natu and Kekar from the category of witnesses. It seems clear **[139]** from cls. (2) and (3) of s. 337 of the Criminal Procedure Code that they are to be made available as witnesses at the trial of the case in the Sessions Court. Moreover, it is the intention of the law that a person to whom a tender of pardon has been made should not be

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tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard and determined. See *Queen-Empress* v. *Sudra* (1). We must also point out that in committing the accused for trial for an offence under s. 194 of the Indian Penal Code the Magistrate appears to have contravened the injunction contained in cl. (3), s. 339 of the Criminal Procedure Code, *viz.*, "no prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court." Under the circumstances we quash the commitment of Natu and Kekar, and direct that they be detained in custody until the termination of the trial of Sarafdi by the Court of Session. This order will not preclude the Magistrate from hereafter proceeding against Natu and Kekar in accordance with law.

S. C. B.

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27 C. 139=4 C.W.N. 97.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

MANKURA PASI AND OTHERS *v.* QUEEN-EMPRESS.* [7th August, 1899.]

Evidence—Evidence in Criminal case—Evidence of bad character—Belonging to a gang of persons associated for the purpose of habitually committing theft—Penal Code (Act XLV of 1860), s. 401—*Evidence Act (I of* 1872), *s.* 14 *and s.* 54 *as amended by Act III of* 1891.

The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft punishable under s. 401 of the Indian Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence.

Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one [140] another and were in the habit of visiting *melas* together, that one of them was arrested in the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses, *Held*, they could not be convicted under s. 401 of the Indian Penal Code, there being no proof that they belonged to a gang of persons associated for the purpose of habitually committing theft.

[F., 17 Ind. Cas. 543 (544)=36 P.W.R. 1912; R., 13 P.R. 1914 (Cr.); D., 38 C. 408 (411)=15 C.W.N. 461=12 Cr L.J. 97=9 Ind. Cas. 555.]

AT a *mela* in Gaya Lachman Pasi was caught by the police in the act of picking a pocket, his companion Thakur Basi was pursued towards a house. On the house being surrounded and searched by the police, the appellants, including Thakur Basi, were found in it. Some money and various articles were found with the appellants, but none of these things were shown to have been stolen property. It was proved that the appellants came from the same neighbourhood in Oudh and were possessed of little means of subsistence; that some of them had been convicted of theft, and that there were orders requiring some of them to furnish security for good behaviour. The appellants were all convicted by the Sessions Judge of Gaya, under s. 401 of the Indian Penal Code, of belonging to a gang of persons associated for the purpose of habitually committing theft.

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* Criminal Appeals Nos. 226 and 308 of 1899, made against the order of H. Holmwood, Esq., Sessions Judge of Gaya, dated the 20th of February 1899.

(1) 11 A. 336.

Four of the appellants were sentenced to seven years rigorous imprisonment, seven others to five years rigorous imprisonment, and the remaining six to three years rigorous imprisonment. **1899** AUG. 7.

Mr. *P. L. Roy* (with him Babu *Jogesh Chandra De*), for the appellants.—To establish the offence under s. 401 of the Indian Penal Code it is necessary to prove (*a*) the existence of a gang, (*b*) association, and (*c*) association for the purpose of habitually committing theft. The mere fact that certain persons are seen together does not establish the existence of a gang; it may be evidence of association, but mere association is not enough. For a conviction under this section it is necessary to go further and show that the association was for the purpose of habitually committing theft. Habit implies the commission of more than one offence of theft; there is no evidence of habit in this case. Then the judgment of the lower Court is vitiated by the wholesale improper admission of evidence as to character and reputation. Character cannot be said to be a fact in issue in this **[141]** case; see s. 14 of the Evidence Act. Even if it is admitted for the sake of argument that a previous conviction is admissible it cannot be contended that evidence may be given of general reputation. *Shriram Venkatasami* v. *Queen* (1), *Queen* v. *Kamal Fukeer* (2), *Queen* v. *Mooktaram Sirdar* (3), *Empress* v. *Naba Kumar Patnaik* (4). APPELLATE CRIMINAL. 27 C. 139 = 4 C.W.N. 97.

The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), for the Crown.—There is ample evidence which, if believed, would show that the accused persons along with others formed a gang, and there is also proof of association. The only question is whether it has been proved that the prisoners associated together for the particular purpose of habitually committing theft. It is not required to show that they did actually habitually commit theft, but only that they associated with that object. The object is a matter of inference to be drawn from the circumstances of each case. The question whether evidence of character is admissible in a case under s. 401 of the Penal Code is not free from difficulties. If a number of persons be found to be a gang associated together, then the character which these persons bear may be relevant to show what is the object of their association.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows:—

JUDGMENT.

The appellants on these two sets of appeals have all been convicted at the same trial under s. 401 of the Penal Code of belonging to a gang of persons associated for the purpose of habitually committing thefts. The evidence shows that they all came from the same neighbourhood in Oudh, and that they are in many respects associated together. The question, however, raised is whether the evidence proves the particular offence that their association was for the purpose of habitually committing thefts. The circumstances which have led to this case are remarkable.

[142] There was a big religious gathering or *mela* at Gaya early in September last, and the police were on the look-out to protect the public against thefts committed when crowds were assembled. Lachman Pasi was caught in the act of picking a pocket, and his companion was pursued towards a certain house. That house was surrounded by the police and

(1) 6 M. H. C. 120.
(2) 17 W.R. Cr. 50.
(3) 23 W.R. Cr. 18.
(4) 1 C.W.N. 146.

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searched, and in it the appellants were found, including Thakur Basi, who has been identified as the man who was pursued. While the house was surrounded a man was seen trying to escape by walking on the cornice towards the roof of the adjoining house. The cornice gave way, he fell and was killed instantaneously by the fall. He was the man who had taken in the appellants as lodgers. Some money and various articles were found with the appellants, but none of these articles have been shown to be stolen property. The conviction of the appellants really depends upon the suspicious circumstances under which they were arrested.

There is some evidence of bad character; there are the convictions of some of them for theft, and orders requiring some of them to furnish security for good behaviour, and there is the fact that thay are possessed of little means of subsistence. The reported cases of convictions of this offence are few. In *Shriram Venkatasami* v. *Queen* (1), it was laid down that in order to prove an offence under s. 401 of the Penal Code there must be (1) proof of association, (2) proof that such association was for the purpose of habitual theft, and it was added that habit is to be proved by an aggregate of acts. In that case the report seems to show there was some evidence, which was accepted by the jury, that a number of thefts occurred at the same time, and in the same neighbourhood, where the accused were found, from which it was found that the association of the accused was for the purpose described by s. 401 of the Penal Code; and it was apparently on this ground that, although the learned Judges held that the charge to the jury was defective, they refused to interfere, because it was not shown that the accused had been prejudiced by this defect. In the present case there is no such evidence. We have only the evidence of this one instance of picking a pocket for which Lachman Pasi was arrested.

[143] There are two cases, *Queen* v. *Kamal Fukeer* (2) and *Queen* v. *Mooktaram Sirdar* (3), on s. 400 of the Penal Code, a cognate offence, which do not throw much light on the matter now under consideration, except that it was held that there must be evidence that the accused were members of a gang associated for the purpose of habitually committing dacoity.

We have also been referred to the case of *Empress* v. *Naba Kumar Patnaik* (4), in which it was considered whether evidence of the previous convictions of some of the accused of dacoity was admissible for the purpose of proving association for that purpose and bad character. It is unnecessary to repeat the grounds upon which the learned Judges held, on consideration of s. 54 of the Evidence Act, as amended by Act III of 1891, s. 6, and s. 14 of the Evidence Act, as well as upon the terms of s. 310 of the Code of Criminal Procedure, that such evidence was inadmissible as evidence of bad character, because we concur with the judgment delivered. It is sufficient to add, in reference to the case now before us, that the character of the accused was not in issue, and that in consequence evidence of such character or reputation is not admissible. Such evidence, we observe, has, in the case before us, formed the main if not the only ground on which the appellants have been convicted, and when that evidence is examined, it will be found to consist of convictions of theft against only a few of the appellants. It would be very unsafe to rely upon

(1) 6 M.H.C. 120.
(2) 17 W.R. Cr. 50.
(3) 23 W.R. Cr. 18.
(4) 1 C.W.N. 146.

the convictions, so as to connect all the appellants with the unlawful association within s. 401, even if such evidence were admissible. And in addition to such evidence we find on the record some orders in which some of the appellants have been required to give security for good behaviour. But even here it is not shown by those orders that the grounds on which they were passed were that these persons were habitually addicted to theft, so as to form a link in the evidence in this case, supposing for the sake of argument, and on such grounds only, that such orders were admissible as evidence.

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The case against the appellants, therefore, rests on their being [144] found together at some distance from their houses, that they are all intimately connected with one another, that they are in the habit of visiting *melas* together, that one of them was arrested in the act of picking a pocket, and that, when they were arrested, many of these gave false names and false addresses. However suspicious the circumstances in this case may be, we think the evidence falls short of what is necessary for conviction under s. 401 of the Penal Code, for, in our opinion, there is no proof that the appellants belonged to a gang of persons associated for the purpose of habitually committing theft.

The conviction and sentences are, therefore, set aside, and the appellants must be released.

D. S.

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27 C 144.

CRIMINAL REFERENCE.

Before Mr. Justice Rampini and Mr. Justice Pratt.

QUEEN-EMPRESS *v.* DEODHAR SINGH AND ANOTHER*.
[5th September, 1899.]

Penal Code (Act XLV of 1860), *s.* 218—"*Charged,*" *Meaning of, in that section—Criminal Procedure Code (Act V of* 1898), *s.* 4, *cls. (f) (n)—Cognizable offence—Offence under Gambling Act—Accomplice—Witness present on the occasion of the giving of a bribe.*

The District Superintendent of Police gave a warrant under the Gambling Act (Bengal Act II of 1867) to *D*, a Sub-Inspector, to arrest persons found gambling in a certain house. In order to save two persons from legal punishment for having committed an offence under the Gambling Act in that house, *D* framed a first information and a special diary incorrectly. *Held*, he was properly charged with, and found guilty of having committed, an offence under s. 218 of the Penal Code. The word "charged" in that section is not restricted to the narrow meaning of "enjoined by a special provision of law." An offence under the Gambling Act, being an offence for which the District Superintendent of Police may arrest or by warrant direct an arrest, is a cognizable offence within the meaning of s. 4, cl. *(f)* of the Criminal Procedure Code. The words "a Police Officer" in that clause do not mean "any and every police officer;" it is sufficient if the Legislature by any law limits the power of arrest to any particular class of Police Officers.

[145] *D* and *F*, a Head Constable, were also charged under s. 161, and s. 161 read with s. 114 of the Penal Code, respectively, and it was contended that these charges were not sustainable, because they rested entirely on the testimony of persons alleged to have been accomplices, who had not been corroborated in material particulars. *Held*, the mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.

* Criminal Reference No. 19 of 1899, made by G.W. Place, Esq., Sessions Judge of Patna, dated the 16th of June 1899.

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Queen v. *Chundo Chundalinee* (1); *Queen-Empress* v. *Maganlal* (2); *Queen Empress* v. *Chagan Dayaram* (3); *Queen Empress* v *O'Hara* (4); *Ishan Chundra* v. *Queen-Empress* (5); *Jogendra Nath Bhaumik* v. *Sangat Garo* (6); *Rajoni Kanto Bose* v. *Asan Mullick* (7) and *Ahmuddin* v. *Queen-Empress* (8); distinguished.

[F., 33 C. 649=10 C.W.N. 669 (672); R., 35 M. 397 (479)=13 Cr.L.J. 352=12 M.L.T. 1=(1912) M.W.N. 549=14 Ind. Cas. 896; 12 Cr.L.J. 150 (155)=9 Ind. Cas. 897 =21 M.L.J. 283=10 M.L.T. 84=(1911) 2 M.W.N. 327; 22 M.L.J. 490 (531)= (1912) M.W.N. 207=14 Ind. Cas. 849.]

REFERENCE under s. 307 of the Criminal Procedure Code by the Sessions Judge of Patna. The material portions of the letter of reference are as given below:—

"In this case two Police Officers, *viz.*, Deodhar Singh, Sub-Inspector of Khajekalan Police Station in Patna City, and Fariduddin, a Head Constable in the same station, were charged respectively with accepting an illegal gratification under s. 161 of the Penal Code in three separate instances, and with abetting the same three separate instances. Deodhar Singh was also charged under two heads with an offence under s. 218 of the Penal Code, *viz.*, framing a first information and a special diary incorrectly to save two persons from legal punishment.

"These alleged offences were committed in reference to a gambling case under the Gambling Act (Bengal Act II of 1867). The Sub-Inspector was given a warrant by the District Superintendent of Police under this Act to arrest persons found gambling in a certain house. He and the Head Constable, assisted by a large force of constables, arrested a number of persons and brought them to the thannah. He is alleged to have so framed the first information report, and the special diary so as to save two of the men arrested from legal punishment, and then in releasing some of the others on bail he and the Head Constable are respectively alleged to have **[146]** committed offences and abetment of offences under s. 161 of the Penal Code.

"The jury by a majority, *viz.*, three to two, found Deodhar Singh guilty of offences under s. 218 of the Penal Code, and I concurred in this portion of their verdict.

"But the jury also found by the same majority that the two accused were guilty of the other charges against them under ss. 161 and 114 respectively.

"It was contended by the counsel for the defence that the witnesses to each of the alleged offences under s. 161 or to the three instances of bribery, as it is commonly called, were accomplices, and were subject to the rule of law laid down in illus. (6) under s. 114 of the Indian Evidence Act, *viz.*, that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. He quoted *Queen Empress* v. *Maganlal* (2) and *Rajoni Kanto Bose* v. *Asan Mullick* (7), two cases very similar to this in which the Bombay High Court, and the Calcutta High Court, respectively, acquitted the accused on the ground that the only evidence against them was that of accomplices and that it was uncorroborated.

"In the case of the first charge of bribery in which one Radhay Lall paid Rs. 200 to get one Paltu Lall released on bail, the witnesses besides these two are Babu Radha Kant Datta, a pleader, and Liakat Hossein, Writer Constable. Radhay Lall is clearly an accomplice, so is Pultu Lall. Babu Radha Kant consented to the bribe as he never informed

(1) 24 W.R.Cr. 55. (2) 14 B. 115. (3) 14 B. 331. (4) 17 C. 642.
(5) 21 C. 328. (6) 2 C.W.N. 55. (7) 2 C.W.N. 672. (8) 23 C. 361.

any competent officer of it until six days after, and then he was called by the Assistant District Superintendent of Police and the bribe was paid in his presence without remonstrance. Liakat Hossein, the Writer Constable, says he saw money before the Sub-Inspector, and he placed it at his order on the Sub-Inspector's bed. His demeanour as a witness was suspicious, and he would appear to be also an accomplice. There is besides this no independent evidence to corroborate these statements. One of the men for whom the second bribe was given, *viz.*, Nur Khan, says in cross-examination that the Sub-Inspector Deodhar Singh showed him Rs. 200 given by Paltu Lall. But Nur Khan is an accomplice in the offence that is the subject of the next charge, and it is a rule of law that tainted evidence cannot be corroborated by other tainted evidence, *Queen* v. *Baijoo Chowdhry* (1).

"In the case of the bribe given by Mahomed Kasim for Nur Khan these two men were examined and they are clearly accomplices. Besides them, one witness Brij Kishwar, a mukhtear, distinctly admits that he advised the payment of the bribe, and though he was cognizant of the bribery, he **[147]** made no effort to report it to the authorities, and he made no statement to any competent official to take the matter up until he was sent for by the Assistant District Superintendent of Police. The other witness is Mehdi Hossein. He admits that he and the others arranged to give the bribe. He also is clearly an accomplice and needs corroboration.

"In the case of the bribe given by Rafat Bahadur for the release on bail of Gopi Lall and Gabhan, Rafat Bahadur was examined, and he clearly is an accomplice. Brij Kishwar, the mukhtear, who is a witness to the second bribe, also saw this bribe being paid, and as he is an accomplice in the case of the second bribe his evidence as to this is also tainted and he is unworthy of credit. Nur Khan, an accomplice witness in the case of the second bribe, states he saw this bribe paid. As his evidence in regard to the second bribe is tainted, it cannot be regarded as corroborative in this case. Bani Mirza, another mukhtear, saw this payment of Rs. 10. As he consented to payment of a bribe for Nur Khan, he is also to be considered an accomplice, and his evidence is tainted and thus his corroboration is worthless. He also suppressed all mention of the bribe until he was called by the Assistant District Superintendent of Police.

"A sort of general corroboration was attempted to be given by the Crown in examining one Badrul Hossein, an Honorary Magistrate, to whom it was stated Brij Kishwar mukhtear had written at the time complaining of the bribery practised by the Police.

"It was proved that this Honorary Magistrate did get a letter from Brij Kishwar, but it was lost, and as the Crown showed they were entitled to give secondary evidence, it appears that the letter only mentioned the '*zulum*,' of the Police. It is doubtful if this would be legal corroboration, as previous statements of an accomplice to third parties at the time of the occurrence cannot be considered independent corroboration.

"In my charge to the jury I pointed out that all the witnesses were in my opinion accomplices and unworthy of credit, and that they had not been corroborated by any independent evidence. Under these circumstances I refer the case to the High Court, and think that following the law laid down in *Queen-Empress* v. *Maganlal*, and in the case *Rajoni Kanto Bose* v. *Asan Mullick*, the two accused ought to be acquitted of the charges under ss. 161 and 161/114 of the Indian Penal Code."

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(1) 25 W. R. Cr. 43.

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Mr. *P. L. Roy*, Mr. *K. N. Sen Gupta*, Babu *Mohun Chand Mitter*, and Moulvi *Syed Shamsul Huda*, for the accused.

The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), for the Crown.

The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows :—

JUDGMENT.

[148] This is a reference by the Sessions Judge of Patna under s. 307 of the Code of Criminal Procedure. Deodhar Singh, Sub-Inspector, and Fariduddin, Head Constable, were placed upon their trial, the former on three charges under s. 161 and two under s. 218 of Indian Penal Code, and the latter for abetment of the three offences under s. 161.

The jury by a majority of three to two found the accused persons guilty on all the charges. The Sessions Judge was willing to accept the finding on the charges under s. 218 against the Sub-Inspector, but was of opinion that the charges of bribery and abetment of bribery were not sustainable, because they rested entirely on the testimony of accomplices who had not been corroborated in material particulars. He, therefore, referred the whole case to this Court, being precluded by cl. (2) of s. 307 of the Criminal Procedure Code from recording a judgment of conviction on the charges under s. 218 regarding which he was in agreement with the verdict of the majority of the jury.

The alleged offences are said to have been committed with reference to a gambling case under Bengal Act II of 1867. The accused Sub-Inspector having obtained a warrant under s. 5 of that Act from the District Superintendent of Police to arrest all persons found gambling in the house of Paltu Lall, proceeded at about midnight of the 12th November to make a raid upon the premises. With the aid of the accused Head Constable and a large force of constables he arrested a great many gamblers and brought them to the thannah, and all the 25 persons whom he sent up for trial were afterwards convicted, with the exception of one man, who was treated as an approver.

In his first information report purporting to have been written at 1 A.M., the Sub-Inspector does not include Nawab Singh and Rung Lal in the list of persons arrested, and in his special diary, prepared almost simultaneously, he states that they were found at the door of Paltu's house and were not concerned in the gambling within, and so he had promptly let them go. The case for the prosecution is that these two men were arrested with the others inside the gambling house, taken [149] with them to the thannah and not released till 7 or 8 A.M. The Sub-Inspector is accordingly charged under s. 218 with framing two incorrect records with intent to save Nawab Singh and Rung Lal from legal punishment.

It is further alleged that the Sub-Inspector did not release some of the other prisoners on bail until he received bribes for the purpose, and that he was aided and abetted by Fariduddin, Head Constable. Three specific instances of the receipt of illegal gratifications have been deposed to and embodied in the charges, *viz.*, (1) Rs. 200 paid by Radha Lall for the release of Paltu ; (2) Rs. 50 paid by Mahomed Kasim for the release of Nur Khan, and (3) Rs. 12 paid by Rafat Bahadur for the release of Gopi Lall and Gabhan Lall.

As regards the charges under s. 218 two questions arise, one of fact and the other of law. The question of fact is whether Nawab Singh and

Rung Lal were actually arrested with the other gamblers and conveyed to the thannah, and there released several hours after their arrest. The Sessions Judge agrees with three of the jurymen that they were, and we are satisfied on the evidence that such was the case. The witness Luchman Singh constable says that 29 men were arrested inside Paltu's house, and that Rung Lal was one of them. Paltu Lall says that both Nawab Singh and Rung Lal were in his house while the gambling was going on. Nadir Ali, constable, who was on sentry duty at the thannah from 2 A.M. to 6 A.M. on the 13th November, says "Deodhar Singh and Fariduddin and others brought 27 persons charged with gambling to the lock up. They were counted in my presence. I know Rung Lal Singh and Nawab Singh *alias* Bindha Singh. I know them for a long time. I saw these men with the accused. 24 were placed in the *hajat*: Rung Lal, Nawab and Nanku were not placed in *hajat*. They were allowed to remain outside the lock-up, and then they were taken to the Sub-Inspector's room. These three men are well to do. They were let go. No money was paid in my presence. I heard the sound of money." Another constable named Mazhur Hossein, whom the Sub-Inspector took with him to the scene, says he was present when the [150] arrests were made, that Rung Lal was one of the persons arrested, and that he was taken to the thannah at 3 A.M.

Hari Charan, the approver in the gambling case, deposes that Nawab Singh and Rung Lal were inside Paltu's house with the other gamblers. Finally we have the testimony of Radha Kant, a pleader of the Judge's Court, who says he knows Rung Lal and saw him at the thannah when he went there at 8 A.M. Some witnesses put the release of the two men at an earlier hour, but the pleader's estimate of time is more likely to be correct. On the whole evidence we are satisfied that the Sub-Inspector released the two men many hours after they had been lawfully arrested, and that he framed incorrect records to save them from punishment, probably because they had made it worth his while to do so.

The question of law raised before us is that the offence does not come within the purview of s. 218, because the Sub-Inspector was not "charged" by law or competent authority with the preparation either of a first information report or of a special diary, and that his action was voluntary and superfluous. It is conceded that if the offence for which the warrant of arrest was issued be a cognizable one, the Sub-Inspector was charged with the duty of preparing the documents which he furnished. It is contended that the offence is a non-cognizable one within the meaning of cl. (1) (*n*) of s. 4 of the Code of Criminal Procedure.

Now, under the Gambling Act, it is not every Police Officer who can arrest without a warrant. It is only the District Superintendent of Police who can arrest or by warrant direct the arrest of persons gambling in a house. The District Superintendent being a Police Officer who may, under a law for the time being in force, *viz.*, the Gambling Act, arrest without warrant, we think that the requirements of cl. (1) (*f*) of the above sections are satisfied, and that the offence in question is, therefore, a "cognizable offence." We cannot accept the contention that the words in that clause "a Police Officer" mean "any and every" Police Officer. It is sufficient if the Legislature has limited the power of arrest to any particular class of Police Officers. We [151] may add that we do not think the word "charged" in the section is restricted to the narrow meaning of "enjoined by a special provision of law." The District Superintendent says it was the practice to require a first information report, &c., in gambling cases just as

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in ordinary cognizable cases, and therefore the Sub-Inspector was not acting of his own volition but in pursuance of an order laid upon him.

Therefore, both in law and fact, we find that Deodhar Singh is guilty of the charges under s 218.

Turning next to a consideration of the charge under ss. 161 and 161/114 we find that the first refers to a bribe given by Radha Lall on behalf of Paltu. The witnesses in support of it are Paltu, Radha Lall, Mir Khan, who was punished for gambling, Liakat Hossein, Writer Constable, and the pleader, Radha Kant. The Deputy Legal Remembrancer contends that the last named was not an accomplice, though it seems clear that the others were.

The next charge relates to a bribe of Rs. 50 given by Mahomed Kasim to procure the release of Nur Khan. The witnesses to this are Brij Kishwar, mukhtear, Medhi Hossein and Mahomed Kasim; while Beni Mirza gives corroborative evidence as to the demand of money and other circumstances, though he did not actually see the payment. With reference to this matter Radha Kant says he saw Beni Mirza and Brij Kishwar at the thannah in the Sub-Inspector's room, that they came to bail out Nur Khan and were talking to the Sub-Inspector and Head Constable about releasing Nur Khan on bail, and his impression is that they were talking about money.

The third and last charge relates to Rs. 12 paid by Rafat Bahadur for the release of Gopi Lall and Gabhan Lall. Rafat is not connected with these men, but is related to Páltu. Beni Mirza and Nur Khan say they witnessed the payment. Rafat and Nur Khan are undoubtedly accomplices, but regarding these two latter cases the Deputy Legal Remembrancer thought it sufficient to contend that Beni Mirza was not an accomplice. The question for determination is, therefore, whether Radha Kant [152] and Beni Mirza are accomplices; for if they are not, we think we may safely rely upon their corroboration. Under the existing law the evidence of an accomplice is admissible, and a conviction is not illegal, because it proceeds upon the uncorroborated testimony of an accomplice. But the presumption stated in illustration (*b*) of s. 114 of the Evidence Act that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of almost universal application. The question arises, what is an accomplice? In Wharton's Law Lexicon he is defined as "one concerned with another or others in the commission of a crime." In Webster's Dictionary we find the definition "an associate in the commission of a crime, a participator in an offence whether as principal or an accessory." Mr. Roy for the accused contends that the term "accomplice" has a wider signification, and that both Radha Kant and Beni Mirza were accomplices, because they were present when one or more of the bribes was paid, and yet did not inform the authorities for several days. He cited the following cases in the course of his argument: *Queen* v *Chundo Chundalinee* (1); *Queen-Empress* v. *Maganlal* (2); *Queen-Empress* v. *Chagan Dayaram* (3); *Queen-Empress* v. *O'Hara* (4); *Ishan Chundra* v. *Queen-Empress* (5); *Jogendro Nath Bhaumik* v. *Sangat Garo* (6); *Rajoni Kanto Bose* v. *Asan Mullick* (7); and *Alimuddin* v. *Queen-Empress* (8).

In *Queen* v. *Chundo Chundalinee* (1), persons who were regarded as accomplices were described as "more or less participators in the crime,"

(1) 24 W.R. Cr. 55. (2) 14 B. 115. (3) 14 B. 331. (4) 17 C. 642.
(5) 21 C. 328. (6) 2 C.W.N. 55. (7) 2 C.W.N. 672. (8) 23 C. 36.

which was one of murder by poison. One of them was an inmate of the house where the man was poisoned in her presence, the other supplied the poison, and both of them, though aware of the crime, took no means to prevent or disclose it, although bound by s. 44 of the Code of Criminal Procedure **[153]** to give prompt information to the nearest Magistrate or Police Officer.

In *Queen-Empress* v. *Maganlal* (1) and *Queen-Empress* v. *Chagan Dayaram* (2) the persons described as accomplices were persons who had either subscribed to the bribe or collected subscriptions or paid the money to the accused. That would bring them within the definition we have previously indicated. In *Queen-Empress* v. *O'Hara* (3), known as the O'Hara case, PETHERAM, C. J., in delivering the judgment of the Full Bench, observed : "We think that these facts are such as would form sufficient grounds for putting Goldsborough on his trial upon a charge of abetting the murder, and this, notwithstanding the remonstrance which, according to his evidence, he offered to O'Hara just before the shot was fired. From this point of view, and having regard to the fact that he had received a pardon under s. 337, and gave his evidence under that section, Goldsborough was, we think, an accomplice within the meaning of the rule under the law existing in India."

In the case of *Ishan Chandra* v. *Queen-Empress* (4) the informer Gooroo Pershad revealed a plot, which had for its object the substitution of a forged document for a genuine one in a Collectorate record, and his evidence was that he had joined the conspiracy at the outset, not with criminal intent, but in order to frustrate the plot and bring the criminal to justice. In referring to this the Judges said : "We are not prepared to say that he was an accomplice. He may have been one, but it would be impossible to say in this case that he helped in the commission of the offence. He was undoubtedly cognizant of it, and omitted to disclose it for six days. From any point of view we do not think that his testimony is such as to justify a conviction, except where he is corroborated." Fro this we may gather that in the opinion of the Court the mere fact that Gooroo Pershad was cognizant of the offence, and omitted to disclose it for six days, was not sufficient to constitute him an accomplice when it did not appear that he helped in the commission of the offence.

[154] In the case of *Jogendro Nath Bhaumik* v. *Sangat Garo* (5) it appears that after the amount of the bribes had been settled with the Head Constable, the persons went home for the money, and next day they took the two witnesses with them to the thannah and made the payments. There the witnesses seem to have aided and abetted the bribe-givers ; they accompanied them for the express purpose of paying the bribes, and so were treated as no better than accomplices. In the case of *Rajoni Kanto Bose* v. *Asan Mullick* (6), it was held that persons who went to see and assist in the payment of bribes were accomplices. In the case of *Alimuddin* v. *Queen-Empress* (7) it was held that where witnesses appeared to have taken an active part in carrying away a person after he had been grievously assaulted and was in a helpless condition, and then leaving him in a field where he was subsequently found dead, their evidence was no better than that of accomplices; at any rate, they took such a part in the transaction as to make it most unsafe for the Court to rely upon their evidence, unless corroborated in material respects.

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(1) 14 B. 115. (2) 14 B. 331. (3) 17 C. 642. (4) 21 C. 328.
(5) 2 C. W. N. 55. (6) 2 C. W. N. 672. (7) 23 C. 36.

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Now, in the present case, no obligation was imposed by law upon Radha Kant or Beni Mirza to inform the authorities about the taking of bribes. And unless it can be shown that they somehow co-operated in the payment of bribes, or were instrumental in the negotiations for their payment, we think that none of the cases which have been cited is an authority for the proposition that they were accomplices, inasmuch as they witnessed the payment and did not promptly inform the authorities. As regards the pleader witness it is in evidence that, so far from countenancing the payment of a bribe, some angry words passed between him and the Sub-Inspector on the subject. He himself says: "I thought it would be foolishness for me to remonstrate, as I saw they were determined to take. I felt that great oppression was practised by the Police Officers. I told Paltu he could get off on presenting a petition; so far as I remember, I said it was not advisable to give any bribe." Referring to his delay in informing the authorities, he said: "After Paltu was [155] released on bail I wanted to inform the Magistrate or the District Superintendent of Police, or the Assistant District Superintendent of Police. I did not do it on that day as there was no hurry. On the following Friday, *i.e.*, four or five days after, I informed the Assistant District Superintendent of Police and he recorded my statement." He also said, "I took advice what I should do. I went of my own accord to the Assistant District Superintendent of Police, I was advised by elders not to mix in this matter, unless I was asked. . . . . . . I considered there would be no stop put to such *zulum* as I saw at the thannah unless I spoke."

We find nothing blameworthy in Radha Kant's conduct, and we think it was only natural that he should hesitate and take advice before venturing to launch a complaint of bribery against the Police. Beni Mirza is a mukhtear who went to get Nur Khan released on bail, a perfectly legitimate action. The Sub-Inspector told him that Rs. 200 had been settled, and that if he paid that sum Nur Khan would be released. Next Brij Kishwar came and promised Rs. 50. As a matter of fact Beni Mirza did not stop to see the bribe paid, and there is nothing to show that he joined in the negotiations regarding it. He says he told the darogah it was illegal. He actually saw Kafat Bahadur pay Rs. 12 for the release of other men, but that was a matter in which the witness in no way concerned himself. He made his statement to the Assistant Superintendent five days after the occurrence.

We must hold that Beni Mirza was not an accomplice. It is abundantly proved that the Head Constable, whose presence is not denied, was an active agent in obtaining the bribes. All the charges under ss. 161 and 161/114 are satisfactorily proved. It will, however, be only necessary to pass sentence regarding one of them.

We find Deodhar Singh guilty of the charges under ss. 218 and 161 of the Indian Penal Code, and direct that he be sentenced to six months' rigorous imprisonment on one charge under s. 218, and to a further term of six months rigorous imprisonment on one of the charges under s. 161, or to an aggregate of one year's rigorous imprisonment. We pass no sentence on the remaining charges.

[156] We find Fariduddin guilty of the charges under s. 161 read with s. 114 of the Indian Penal Code, and direct that he undergo six months' rigorous imprisonment.

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PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse, and Davey, Sir R. Couch, and Sir Edward Fry.

[*On appeal from the High Court at Fort William in Bengal.*]

BENI PERSHAD KOERI (*Plaintiff*) *v.* DUDHNATH ROY AND OTHERS (*Defendants*). [16th, 20th, and 21st June and 22nd July, 1899.]

Grant—Construction of grant—Grant by zemindar of estate for maintenance—"Pottah dawami" made to a lessee by the grantee in excess of his estate to what extent effectual, from circumstances.

A grant of a village for maintenance was made by a zemindar to his nephew, operating only for life. The grantee survived the grantor, and by ikrarnama acknowledged the succeeding zemindar to be entitled to the village. The grantee had, however, already executed a pottah, described therein as permanent, to a lessee. The latter obtained possession, and from him after the death of the original grantee for life the zemindars who succeeded the grantor accepted rent at the rate stipulated in the pottah, and did not disturb his possession. This suit after the death of the lessee claimed the village as part of the inherited zemindari, the defence being that the lease was perpetual.

Held, (1) that the original grant not having extended to more than the life of the grantee, the pottah was void as against the successor in title of the grantor, and not merely voidable after the grantee's death. The acceptance of rent at the rate in the pottah could not have the effect of confirming it in its entirety, which, according to the construction of the High Court, would have been for a permanent estate. The duration of the pottah could not exceed that of the original grant; nor could an admission, taken by the High Court to have been that the acceptance of rent had confirmed the permanency of the lease, preclude the claim for legal rights, even supposing that admission to have been made. The matter in contest was as to the circumstances under which the lessee was allowed to remain in possession, and their legal effect. And, on the evidence, the lessee had been allowed to remain as a mokurrari tenant for his life.

(2) The suit for possession was not barred under art. 91 of the Limitation Act (XV of 1877) on the ground that a decree declaratory of title [157] to have the pottah cancelled might have been sued for in the lessee's life-time under s. 39 of the Specific Relief Act, 1877.

(3) The possession of a tenant for life is not rendered adverse within the meaning of Act XV of 1877 by a notice from the tenant that he claims to be holding on a perpetual or hereditary tenure.

[**N.F.**, 18 C.L.J. 23 (26) = 21 Ind. Cas. 204 ; **F.**, 1 C.L.J. 517 (522) ; 11 C.W.N. 340 (342) ; 7 Ind. Cas. 218 (222) ; **Appl.**, 2 C.L.J. 20 (34) ; 4 C.L.J. 399 ; 37 P.R. 1909 = 38 P.L.R. 1909 = 50 P.W.R. 1909 = 1 Ind. Cas. 732 ; **R.**, 30 C. 20 (30) ; 31 C. 428 (430) ; 37 C. 674 (676) = 6 Ind. Cas. 339 ; 39 C. 439 (446) = 15 C.L.J. 194 = 16 C.W.N. 304 = 13 Ind. Cas. 517 ; 24 M. 246 (251) = 10 M.L.J. 415 ; 25 M. 507 (513) ; 7 C.L.J. 152 (163) ; 8 C.L.J. 261 = 12 C.W.N. 1086 ; 17 C.L.J. 233 = 18 Ind. Cas. 969 ; 6 C.W.N. 796 (799) ; 9 C.W.N. 292 (298) ; 12 C.W.N. 63 (64) ; 37 M. 1 = 8 M.L.T. 258 (264) = 7 Ind. Cas. 202 = (1910) M.W.N. 369 ; 7 O.C. 187 (190) ; 7 O.C. 372 (376) ; 56 P.R. 1903 = 93 P.L.R. 1903.]

APPEAL from a decree (12th July 1897) of the High Court, reversing a decree (31st December 1894) of the Subordinate Judge of Shahabad.

The appellant was the widow and executrix of the late Sir Radha Pershad Singh, K. C. I. E., Maharajah of Dumraon, who commenced proceedings on the 7th April 1893. The only respondent who appeared was Dudhnath Roy, the representative of a purchaser claiming upon the estate of the late Ram Golam Raut ; other defendants in the suit having been relations of the latter.

The present suit was for the recovery of the proprietary possession of village Dumra, part of the family zemindari granted by the plaintiffs'

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ancestor, Jai Perkash Singh, on the 13th November 1836 to his nephew Barmeswar Baksh Singh for maintenance. The late Maharajah was the third in succession from the grantor, having succeeded to the zemindari in 1871

In 1849 Dumra was conveyed by Barmeswar to Ram Golam Raut by an instrument purporting to be a dawami istemrari pottah or permanent lease. Barmeswar also in 1857 executed an ikrarnama to Maheshwar Pershad Singh, the zemindar of that day, acknowledging his title to the village.

The main question on this appeal was, to what interest in the village was Ram Golam entitled when he died in 1893, the respondent claiming title under him against the estate of the late Maharajah. The terms used in the pottah of 1849 were "pottah dawami."

The Subordinate Judge, Babu Bhugwan Chunder Chatterjee, was of opinion that, as the conveyance of the 13th November 1836 was only a maintenance grant, the village was not granted for a perpetual, but only for a life estate, and that the property therein belonged to the inheritance of the zemindar at the time being on the death of Barmeswar. The Judge cited, as to the construction of grants for maintenance, *Anund Lal Singh Deo* [158] v. *Dheeraj Gurrood Narayan Deo* (1), *Salur Zamindar* v. *Pedda Pakir Raju* (2), *Woodoy Aditto Deb* v. *Makoond Narain Aditto Deb* (3), and *Uddoy Adittya Deb* v. *Jadublal Adittya Deb* (4). As to the words relied on by the defendants as denoting perpetuity, he cited *Tulshi Pershad Singh* v. *Ram Narain Singh* (5) and other cases therein referred to.

He held that the village might have been resumed by the zemindar on the death of the tenant for life, but that Ram Golam was permitted to remain in possession. It was only on the death of the latter that limitation began to run. His decision was, therefore, in favour of the plaintiff.

The defendant, Dudhnath Roy, alone appealed to the High Court. The plaintiff with her co-executor filed cross-objections. A Division Bench (TREVELYAN and STEVENS, JJ.) in giving their judgment stated that the counsel for the plaintiff "admitted that his client accepted rent from Ram Golam, and that the terms of the lease under which Ram Golam took were binding on his client." Upon this admission they considered that the question for their determination was as to the construction to be placed on the pottah of the 25th February 1849. On this they held that the description of the pottah contained in it, as a "dawami pottah," was conclusive as to its construction and effect; the meaning of the word "dawami" being perpetual. The Subordinate Judge's decree was therefore reversed.

On this appeal,—

Mr. *J. D. Mayne* and Mr. *J. H. A. Branson*, for the appellant, submitted that the High Court was wrong in holding that the pottah of 1849 could operate to confer, or was intended to confer, upon Ram Golam any interest greater than that which Barmeswar Buksh possessed under the maintenance grant of 1836. That interest was for the life of the latter only, and upon no contention could the permission of the successive zemindars be said to have prolonged the estate of Ram Golam beyond his [159] life. It was error in the judgment of the High Court that they held that the acceptance of rent by the zemindars after the death of

(1) 5 M. I. A. 82. (2) 4 M. 371. (3) 22 W.R. 225.
(4) 5 C. 113. (5) 12 C. 117 = 12 I. A. 205.

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Barmeswar from Ram Golam had the effect of confirming the pottah of 1849 as a permanent and heritable tenure which would remain in force after the death of the lessor. It was a fact, no doubt, that rent had been accepted by the zemindars after the restoration of the village by the ikrar-nama of 1855, and the subsequent death of Barmeswar. But the effect caused by that acceptance was a question of law in this case which had not been correctly answered below by reference to an admission of Counsel, even supposing it to have been made with the intent and understanding as stated by the High Court. At all events it was not relevant. If it was made, it went far beyond what the law would infer under the circumstances of the case from the acceptance of rent from a tenant. That acceptance did not involve that the terms of the lease were adopted, and had become binding upon the zemindar. It simply proved acceptance of Ram Golam as a tenant; but for what period, if any period were fixed, whether at will, or from year to year, or for life, or in perpetuity, was left dependent on the interest of Barmeswar, and on the facts. There was no evidence that could be found sufficient to show that the Maharajah had assented to Ram Golam's holding the village permanently, or that the pottah had been understood to convey a tenure in perpetuity; though, as between Barmeswar and Ram Golam, the former made as permanent a lease as he could. As to the true construction and effect of such a pottah, were cited *Anund Lal Singh Deo* v. *Dheeraj Gurrood Narayan Deo* (1), *Tulshi Pershad Singh* v. *Ram Narain Singh* (2), and *Modhu Sudan Singh* v. *Rooke* (3). As to the effect of the statements of Counsel in regard to the legal rights of a suitor *Mathews* v. *Munster* (4), and *The Tasmania* (5) were referred to.

Mr. *C. W. Arathoon*, for the respondent Dudhnath Roy, argued that the lease to Ram Golam of 1849 created a permanent and heritable right in him. The words of the pottah [160] were clear and distinct, being uncontrolled by any other expressions in the document. If the title of Barmeswar were held insufficient to support the interest created by the pottah, it remained that the instrumunt purported to create it, and that after the death of Barmeswar the Maharajahs had in succession accepted Ram Golam as a tenant holding under the terms of the pottah by their having received the precise amount of rent specified therein. That Ram Golam held as tenant in perpetuity was supported by the evidence on the record, and the admission made for the plaintiff was to the same effect. Reference was made *Ram Chunder Singh* v. *Madho Kumari* (6), *Maidin Saiba* v. *Nagapa* (7), and *Petamber Baboo* v. *Nilmony Singh Deo* (8).

In regard to the question of limitation, the suit had been at first one claiming a declaratory decree. It was only on the death of Ram Golam, who was a defendant in that suit, that it was amended so as to become a suit for proprietary possession. Such a suit fell within the bar of Act XV of 1877, art. 91. A suit of the character of which this suit originally was might have been brought under s. 39 of the Specific Relief Act, 1877, at any time after the death of the grantor of the pottah. Again, it was the fact that Ram Golam had constantly asserted his permanent title under the pottah, having set up that title in litigation in such a way as to constitute notice to the Maharajah of a claim to hold adverse possession against him. The litigation referred to was carried on in 1879 more than twelve years

(1) 5 M.I.A. 82.
(2) 12 C. 117=12 I.A. 205.
(3) 25 C. 1=24 I. A. 164.
(4) (1887) L.R. 20 Q B. D. 141.
(5) (1890) L. R. 15 App. Cas. 223.
(6) 12 C. 484=12. I. A. 188.
(7) 7 B. 96.
(8) 3 C. 793.

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before the Maharajah instituted this suit, and there was nothing during that period to prevent him from suing to make good the title on which his representatives now claimed. That Ram Golam was a tenant in perpetuity was consistent with the fact of the Maharajah's permission, and with the probabilities of the case.

Counsel for the appellant were not called on to reply.

The judgment of their Lordships was afterwards, on the 22nd July 1899, delivered by

JUDGMENT.

LORD DAVEY.—This is an appeal from a judgment of the High Court of Calcutta reversing the previous decree of the [161] Subordinate Judge of Zillah Shahabad. The suit was instituted on the 7th April 1893 by the late Maharajah of Dumraon for the purpose of asserting his title to mouzah Dumra. As originally framed, the plaint sought only a declaration of the rights of the Maharajah after the death of one Ram Golam Raut who was the first defendant in the suit. On the death of Ram Golam in August 1893, the plaint was amended and a prayer for possession was added. The Maharajah died pending the suit, and his representatives were substituted in his place as plaintiffs. The Subordinate Judge made a decree in their favour, but the High Court reversed that decree and dismissed the suit with costs. The only appellant in the High Court was Dudhnath Roy, the representative of a purchaser from Ram Golam, and he is the only respondent who appears in this appeal. The question in this appeal turns in the first instance on the construction of a deed, dated the 13th November 1836, by which a former Maharajah, Jai Perkash, granted the village in question with others to his nephew Lal Barmeswar Baksh. In the view which their Lordships take of the case, the construction of the other instrument referred to, being a pottah dated the 25th February 1849 by Barmeswar in favour of Ram Golam, is unimportant. It was contended on behalf of the surviving plaintiff and present appellant that the first deed created only a interest for life in Barmeswar. In consequence of an admission said to have been made by Counsel, the learned Judges in the High Court did not find it necessary to express any opinion on the construction of the first deed, or, as they dismissed the suit on other grounds, on the defence of limitation, and indeed they decided the case entirely on the construction of the pottah. Their Lordships, for reasons which will presently appear, cannot agree with this mode of dealing with the case.

Their Lordships will not discuss at length the terms of the grant to Barmeswar which was expressly made "in lieu of maintenance." It was therefore *prima facie* resumable on the death of the grantor in accordance with the law laid down in the cases cited by the Subordinate Judge. It contains no words purporting to grant a perpetual interest, and as Barmeswar died childless, it is unnecessary to say whether his family would have taken the benefit of it if not resumed. On the 27th January [162] 1857, Barmeswar executed an ikrarnama, by which he declared that as large arrears of Government revenue payable by him under the terms of the grant had fallen due to the then Maharajah Maheswar, and as after his death the property according to the custom would revert to the estate of the Raj, and as a money allowance sufficient for his maintenance had been granted, he surrendered all the mehals which had been given to the declarant in lieu of maintenance to Maheswar, who was then the Maharajah in possession of the Raj. Barmeswar died shortly afterwards without issue.

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The pottah, however, in favour of Ram Golam is dated the 25th February 1849, and therefore several years before this surrender. It is described as a "permanent pottah in favour of Ram Golam Raut." It states that "mouzah Dumra, pergunnah Danwar, tuppa Bisi, has been granted under permanent lease at a fixed annual rental of Co.'s Rs. 200, from the beginning of 1256 F., together with malwajhat, sair wajhat and all habubat by Lal Saheb, the proprietor thereof," and after divers provisions for due cultivation and management, such as are usually inserted in instruments of this character, it concludes in the following words: "For this reason these few words are put down in writing by way of pottah dawami that they may be of use when required."

Barmeswar could not of course transfer to Ram Golam a larger interest in the mouzah than he himself had. Ram Golam's tenure therefore came to an end at latest on Barmeswar's death, but he was left in possession by the Maharajah Maheswar, paying the same rent of Rs. 200 as fixed by the pottah. The Maharajah Maheswar abdicated in 1868, and died in 1871. He was succeeded by his son, the late Maharajah Sir Pershad Singh. On his accession, Sir Pershad Singh might have resumed the mouzah or have made a fresh grant either on the terms of the pottah or otherwise, or have allowed Ram Golam to remain in possession paying a rent. But as the pottah was void as against him, and not voidable only, the mere receipt of rent by him, though of the same amount as that fixed by the pottah, would not have the effect of confirming the pottah in its entirety. The High Court seem to have understood Counsel to have admitted [163] that receipt of rent by the Maharajah operated as a confirmation of the pottah, and the only question therefore which remained was the construction of the pottah. In the opinion of their Lordships this admission, if correctly understood, was erroneous in point of law, and does not preclude the Counsel for the appellant on this appeal from claiming his client's legal rights. What happened was that Ram Golam was allowed to remain in possession at his former rent. The Maharajah indeed subsequently contended that the rent should be Rs. 201, but that probably proceeded from a mistake made by his officers, and in the opinion of their Lordships nothing turns upon it. If matters rested there, their Lordships think there could be no doubt that whatever was the interest which the pottah purported to grant, Ram Golam was in fact a mere tenant-at-will of the Maharajah and could not set up the pottah against him, except for the purpose of showing the amount of his rent. The parties, however, are in conflict as to the circumstances under which Ram Golam was allowed to remain in possession, and as to the legal effect of certain subsequent proceedings upon which the respondent founds his plea of limitation.

Four witnesses, whose credit was not directly impeached, deposed to oral applications by Ram Golam to the officers, first, of Maharajah Maheswar, and subsequently of the late Maharajah, that he might be allowed to hold the ticca granted to him by Barmeswar for his lifetime, and that the successive Maharajahs, consented to do so, but no writing was passed. In the year 1879 Ram Golam commenced a suit against a tenant of the mouzah for arrears of rent, and in his claim he alleged that he held Dumra in perpetual istemrari mokurrari. Thereupon the Maharajah presented a petition of objection, in which he stated that the plaintiff had no mokurrari istemrari pottah, but, on the contrary, the mouzah was held by him under a grant to him subject to the condition of service terminable at the pleasure of the proprietor for his maintenance

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without any title, and the fixed rent was taken as a matter of grace and as customary. He (Ram Golam) was described by the word "malguzar" and the petitioner prayed to be made a defendant. The Maharajah was ordered to be made a defendant as prayed, but there is no evidence of any further proceedings in that suit. On the 29th May 1885 the Maharajah [164] commenced a suit against Ram Golam for recovery of arrears of rent. In his plaint he alleged that mouzah Dumra had been for a very long time continuously held on lease by the defendant for service on an annual rental besides road and public work cesses. In the course of the suit the plaintiff's pleader stated that the ticca was by verbal contract held from Barmeswar by the defendant, and subsequently after consulting his client that it appeared that a terminable lease was granted (not stating by whom) to the defendant on the condition that this lease would continue as long as the defendant remained in the service; when he ceased to be servant the lease would cease to exist, and there was no special time. The defendant (Ram Golam) in his written statement denied that he ever took any ticca from the then plaintiff, and alleged that Barmeswar, under a registered perpetual mokurrari istemrari pottah, made a permanent settlement with the defendant in respect of the said mouzah on an annual rental of Rs. 200, and that he was in possession by virtue of the same perpetual pottah. The Subordinate Judge held (quite correctly) that it was not necessary to decide in that case whether the defendant was the mokurraridar or ticcadar of the mouzah, and that question was left open. But he decided that the defendant held at the rent of Rs. 200 fixed by the pottah and passed a decree for the plaintiff on that basis. In his plaint in the present suit, the Maharajah alleged that on the death of Barmeswar all his maintenance properties reverted to the Raj, and that, as Ram Golam was a very faithful servant of Barmeswar, the Jai Nushin did not think fit to resume the property, and he allowed the mokurrari to remain in the possession of Ram Golam during his lifetime.

The Subordinate Judge has held that the evidence of the four witnesses mentioned above is unreliable, *i.e.*, (as their Lordships understand him) taken by itself. For he found that from the evidence, the circumstances and conduct of the parties, Ram Golam was allowed to enjoy the village as a mokurrari tenant for his life and not as a tenant-at-will. Their Lordships agree in this finding. Both in his petition to be allowed to intervene in the suit of 1879, and in his own suit in 1885, the Maharajah alleged that Ram Golam was holding under some form of verbal grant or lease and license, though his pleader in 1880 stated the tenure to be held at his pleasure, and in 1885 that there was no special term. On [165] the other hand it is obvious, from the proceedings in the previous suits, that the Maharajah was dissatisfied with Ram Golam as a tenant, and it is inexplicable why he should not have sued for recovery of possession of the mouzah as he might have done on any construction of the pottah of 1849, instead of suing only for arrears of rent, unless it was known that Ram Golam had been allowed to hold the mouzah for his life. If this be so, no suit could have been brought for recovery of possession until Ram Golam's death.

Their Lordships will now consider the plea of limitation. It is put by the respondents' Counsel in two ways: First, it is said that the Maharajah Maheswar, and afterwards Sir Pershad Singh, might, on the appellant's own showing, have sued for a declaration of his right to possession on Ram Golam's death under s. 39 of the Specific Relief Act at any

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time after Barmeswar's death, and that this suit as originally framed was in fact one of that character, and further that such a suit was barred by art. 91 of the schedule to the Limitation Act. It is sufficient answer to this argument to say that, though such an action might have been brought, the Maharajah was not bound to bring it, and there was no necessity for him to do so. According to their Lordships' view the pottah (whatever its construction) had become a spent instrument, and had no longer any vitality as a grant of the property. As has been already pointed out, this suit was tried, not on the original plaint, but on the amended plaint which asks for possession. Secondly, it was argued that the plaint in the action of 1879 was notice to the Maharajah that Ram Golam asserted a perpetual istemrari mokurrari title to the mouzah, and from the time when the Maharajah admitted notice of that assertion of right by filing his petition of objection, Ram Golams possession became adverse, and time began to run against any suit for recovery of possession. Their Lordships are not prepared to acquiesce in this reasoning as applicable to the circumstances of this case. All that the plaint of 1879 gave the Maharajah notice of was that Ram Golam claimed to be holding on an istemrari mokurrari tenure, and not under any title derived from the Maharajah himself. But, as pointed out by the Subordinate Judge, an istemrari mokurrari tenure is not necessarily a perpetual hereditary tenure, and the **[166]** plaint of 1879 was not therefore a notice to the Maharajah that he claimed to hold as a tenure of that character.

Their Lordships, however, think that the argument fails on a broader ground. They have already expressed their opinion that Ram Golam was at that time entitled to hold the mouzah for his life, and that no suit for possession could then have been brought against him. And they do not think that a mere notice by a person holding for his life that he claimed to be holding on a perpetual or hereditary tenure would make his possession adverse within the meaning of the Limitation Act, so as to bar a suit for possession on the expiration of the life tenancy. Even if, therefore, the plaint of 1879 did convey the notice which the respondent attributes to it, their Lordships do not think it would support the defence of limitation. Their Lordships, taking this view, are not called upon to decide what interest the pottah, according to its true construction, purported to confer. The learned Judges in the High Court differing from the Subordinate Judge have held that it purported to give the grantee a a perpetual hereditary interest, and they base their decision on the use of the word "dawami." Whether the use of this word necessarily imports a perpetual hereditary interest, or whether, notwithstanding the use of the word "dawami," it may be held that upon the considerations of the object and provisions of the pottah, as well as the surrounding circumstances, the intention to grant a perpetual lease does not sufficiently appear, is a question of some difficulty and remains unaffected if it ever arises again by any decision of the Board.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court be reversed, and instead thereof the appeal to that Court should be dismissed with costs. The respondent, Dudhnath Roy, will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Burton, Yeates & Hart.*

Solicitors for the respondent: Messrs. *Dallimore & Son.*

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[167] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Stevens.

RAM AUTAR SINGH AND ANOTHER (*Defendants*) *v.* SANOMAN SINGH AND ANOTHER (*Plaintiffs*).* [18th July, 1899.]

Jurisdiction of Civil Court—Bengal Tenancy Act (VIII of 1885), ss. 107 and 108—Landlord and tenant—Record of rights—Decision of a Revenue Officer.

An order made by a Revenue Officer under s. 107 of the Bengal Tenancy Act, determining the rent payable for a holding, has the force of a decree; and when not set aside by appeal or otherwise, cannot be questioned in a Civil Court.

[R., 30 C. 339 (362).]

THE plaintiffs, Sanoman Singh and another, brought a suit for rent against Ram Autar Singh and others, claiming rents for three holdings lying within their *putti*, at the following rates: (1) for a *mourasi* holding, at the rate of Rs. 30-13-6 per annum up to 1302 F. S., and at the rate of Rs. 29 1-0 for 1303 F. S.; (2) for a holding purchased from one Lakhia, at the rate of Rs. 19-0-6 per annum; (3) and for a holding purchased from one Gunga Ram, at the rate of Rs. 3-15-0 per annum. The defendants pleaded that the *jama* in each case was less than what was claimed by the plaintiffs, and also pleaded payment.

During the preparation of a record of rights under the Bengal Tenancy Act, there was a dispute as to the amount of rent payable in respect of the said *mourasi* holding, and the Revenue Officer decided that the annual rent was Rs. 29-1-0, apparently with effect from the year 1303 F. S. The decision was affirmed on appeal.

The first Court found that, as regards the *mourasi* holding, the decision of the Revenue Officer was final; that the *jama* of the second holding was as claimed by the plaintiffs, but that the *jama* of the third holding was as admitted by the defendants; but holding that the plea of payment was established, that Court dismissed the suit.

On appeal, the Subordinate Judge agreed with the lower Court [168] as to the rent of the *mourasi* holding, as well as of the second holding above mentioned. He further held that the *jama* of the third holding was as claimed by the plaintiffs, and, disbelieving the plea of payment, decreed the suit.

The defendants Nos. 1 and 2 appealed to the High Court.

Babu *Akshya Kumar Banerjee*, for the appellants.

Babus *Umakali Mukerjee*, and *Satish Chandra Ghose*, for the respondents.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was as follows:—

JUDGMENT.

The learned Vakil for the appellant has very fairly stated his case; but it appears to us that there is really no ground for our interference with the judgment of the Court below.

The only question of law that arises in this appeal is as regards the binding effect of the order of the Revenue Officer made under s. 107

* Appeal from Appellate Decree No. 2320 of 1897, against the decree of Babu Brij Mohun Prasad, Subordinate Judge of Tirhoot, dated the 29th of June 1897, reversing the decree of Babu Tarak Nath Dutt, Munsif of Hajipur, dated the 24th of December 1896.

of the Bengal Tenancy Act in respect of the rent of what is described in the proceedings in this case as the *mourasi jote*. The Revenue Officer, under the provisions of that section, determined that the *jama* payable for the said *jote* was Rs. 29-1 anna. This determination, according to s. 107, has the force and effect of a decree of a Civil Court in a suit between the parties. That section, as also s. 108 of the Act, lay down how a decision of a Revenue Officer may be questioned or set aside; and when the decision of the Revenue Officer with which we are concerned was not set aside, by appeal or otherwise, it must be taken that his determination as to the *jama* payable for the *jote* in question is final. This is the view that was accepted by a Divisional Bench of this Court in the case of *Joypal Dhobi* v. *Palukdhari Das* (1), a view with which we concur.

As regards the rent of the other *jamas*, we think that the appellate Court has come to a right conclusion, and so also as regards the plea of payment raised by the defendants.

Upon these grounds we think this appeal fails, and we dismiss it with costs.

M. N. R. *Appeal dismissed.*

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27 C. 169.

[169] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

AMARENDRA NATH CHATTERJEE AND ANOTHER, MINORS, BY THEIR MOTHER AND GUARDIAN DAKSHABALA DEBI (*Defendants*) v. KASHI NATH CHATTERJEE (*Plaintiff*.)* [24th July, 1899.]

Will—Acknowledgment of signature by testator—Attestation—Witness—Indian Succession Act (X of 1865), s. 50.

The signature of a testator at the commencement of his will, when the witnesses attested it and his admission to the attesting witnesses that the paper which they attest is his last will, constitute sufficient acknowledgment of his signature to his will, even though the witnesses do not see him sign it, or observe any signature to the paper which they attest.

The registration of his will by a testator and his signature to the certificate of admission of execution, testified by the signatures of the Sub-Registrar, and of a witness is sufficient attestation to satisfy the requirements of s. 50 of Act X of 1865.

Manickbai v. *Hormasji Bomanji* (2); *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee* (3); and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (4), referred to and followed.

[R., 4 O.C. 408 (420).]

THIS was an application made by Kashi Nath Chatterjee to obtain probate of the will of his father Jadab Chandra Chatterjee, who died in April 1894. The will was written by the testator and his signature appeared at the commencement of the will on the right hand corner. It was in evidence that the testator told the witnesses before they attested it that the paper which they attest is his will, but that he did not sign it in their presence nor did they see his signature when attesting it. The will was registered by the testator, and on the back of the will was the signature of the testator to the certificate of admission of execution testified by the

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* Appeal from Original Decree No. 250 of 1898, against the decree of J. Windsor, Esq., District Judge of Burdwan, dated the 6th of May 1898.

(1) 2 C. W. N. 491. (See also 17 C 721—Rep.)
(2) 1 B. 547.
(3) 6 C. 17.
(4) 11 C. 429.

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signature of the Sub-Registrar and of one of the attesting witnesses. The grant of probate was opposed mainly on the ground of undue execution.

The Court of first instance held that, although the signature of the testator on the right hand corner of the will was not there when [170] the witnesses attested it, yet it was duly executed, because the will was written by the testator himself, the signature at the beginning of the will was in the testator's handwriting, the testator told the witnesses that it was his will, and also because the testator registered the will and signed his name on the back before the Sub-Registrar, and in the presence of another witness.

From this decision the caveators appealed to the High Court.

Babu *Koruna Sindhu Mukerjee*, and Babu *Lal Mohan Ganguli*, for the appellants.—The case of *Manickbai* v. *Hormasji Bomanji* (1) does not apply, because in that case the Court was satisfied that the signature was there before attestation though the witnesses did not see it, whilst here the lower Court has found that the signature of the testator was not there before attestation. Hence there was an undue execution.

Babu *Nalini Ranjan Chatterjee* for the respondent contended that the lower Court was not right in finding that the signature was not there before attestation as there was no evidence to that effect; and further the registration of the will by the testator, and his signature testified by the signature of the Sub-Registrar and of the witness was sufficient to satisfy s. 50 of Act X of 1865. See *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee* (2) and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (3).

The judgment of the Court (RAMPINI and PRATT, JJ.) was as follows :—

JUDGMENT.

This is an appeal against the decree of the District Judge of Burdwan dated the 6th of May 1898, granting letters of administration, with a copy of the will annexed, to the petitioner.

The case relates to the will of one Jadab Chandra Chatterjee who died in April 1894, and he is said to have executed the will on the 22nd of November 1883. The will, now in dispute, is therefore about fifteen years old. It is admitted that the will was written by Jadab Chandra Chatterjee; but, for the defendants, it is urged that it is not a valid will under s. 50 of the Indian Succession Act.

The District Judge has found that the will was duly executed [171] by the testator. He finds further that the signature on the right hand corner of the will was not there when the witness signed; but that it was duly executed for two reasons,—*first*, that the will was written by the testator himself; that the signature at the beginning of the will is in the testator's handwriting, and it is in evidence that Jadab told the witnesses that this was his will; and, *second*, that the testator registered the will and signed his name on the back before the Sub-Registrar and in the presence of another witness.

Now, the learned pleader for the appellants, who are the minor grandsons of the testator, contends that neither of these signatures, is sufficient to comply with the provisions of s. 50 of the Indian Succession Act.

We think, however, that there has been a sufficient compliance with the provisions of the Act, and that we should confirm the

(1) 1 B. 547. (2) 6 C. 17. (3) 11 C 429.

finding of the lower Court. It is perfectly clear that the testator wrote this will, and that his signature was at the commencement when the witnesses signed, and he admitted to several of the witnesses that this was his last will and testament. And we hold on the authority of the case of *Manickbai* v. *Hormasji Bomanji* (1) that this is a sufficient acknowledgment of the testator's signature, and that, therefore, the will is duly signed. We also think that the registration of the will before the Registrar is a sufficient acknowledgment of the testator's signature. It will be seen that on the back of the will there is the signature of the testator to the certificate of admission of execution, and this is attested by the signatures of the Sub-Registrar and of Nilmadhub Mukerjee. No doubt Nilmadhub says that he did not see Jadab sign the will; but we think that there can be no doubt that the testator must have admitted execution of the will before the Sub-Registrar, and that Nilmadhub signed when he did as admitting that the testator had admitted the execution of the will before him.

We think then that there has been a sufficient acknowledgment of the will. In this view we are supported by the decisions in *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee* (2) and **[172]** *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (3) an unreported case, Appeal from original decree, No. 230 of 1892, decided on the 17th May 1892, by Ghose and Gordon, JJ.

For all these reasons we think that the will in this case has been sufficiently proved, and we dismiss the appeal with costs.

M. R. M. *Appeal dismissed.*

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27 C. 172=4 C.W.N. 166.

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Pratt.

SATIS CHANDRA DAS BOSE (*Petitioner*) *v.* QUEEN-EMPRESS (*Opposite party,*)* [29th August, 1899.]

Sessions Judge, Power of—Criminal Procedure Code (*V of* 1898), *s.* 423, *cl.* (*b*)—*Power of appellate Court to order a retrial.*

A conviction and sentence under s. 211 of the Penal Code, by a Magistrate having jurisdiction to try the case, was on appeal set aside, and a new trial under the same section was directed by the Sessions Judge. It was contended that the power to order a new trial under s. 423, cl. (*b*), of the Criminal Procedure Code could only be exercised when the conviction and sentence was set aside for want of jurisdiction in the trying Magistrate.

Held, that there is nothing in s. 423, cl. (*b*) of the Code to limit the power of an appellate Court to order a retrial.

Queen-Empress v. *Maula Baksh* (4), and *Queen-Empress* v. *Jabanulla* (5), followed. *Queen-Empress* v. *Sukha* (6) disapproved of.

[**R.**, 35 M. 243 (247)=12 Cr. L.J. 269=10 Ind. Cas. 372=21 M.L.J. 805=10 M.L.T. 66=(1911) 2 M.W.N. 106; 11 Cr.L.J. 295=6 Ind. Cas. 251; 7 C.W.N. 301 (304); 17 C.P.L.R. 97 (102); **D.**, 41 C. 350=18 C.W.N. 498=15 Cr. L.J. 385=23 Ind. Cas. 985.]

THE petitioner was convicted by the Deputy Magistrate of Burdwan of an offence under s. 211 of the Penal Code. On appeal, the Sessions

* Criminal Revision No. 542 of 1899, made against the order passed by W. H. Vincent, Esq., Sessions Judge of Burdwan, dated the 19th of June 1899.

(1) 1 B. 547. (2) 6 C. 17. (3) 11 C. 429.
(4) 15 A. 205. (5) 23 C. 975. (6) 8 A. 14.

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Judge set aside the conviction, because he was of opinion that much necessary evidence had not been adduced and much documentary evidence not exhibited, and that a full and complete enquiry into the real facts was advisable, and [173] ordered that the case should be tried *de novo* under the same section. The petitioner obtained a rule to show cause why the said order should not be set aside on the ground that the Sessions Judge had not exercised his discretion properly in remanding the case after the prosecution had had full opportunity of proving the case.

Mr. *P. L. Roy*, and Babu *Huro Prosad Chatterjee*, for the petitioner.

Mr. *M. Hossain*, and Babu *Nogendra Nath Mitter*, for the Crown.

The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows :—

JUDGMENT.

This is a rule calling on the District Magistrate to show cause why the order of the Sessions Judge, directing a retrial in this case, should not be set aside.

The facts of the case are that the petitioner was convicted by the Magistrate of an offence under s. 211 of the Penal Code and discharged of offences under ss. 468 and 471. He appealed to the Sessions Judge, who set aside the conviction and sentence under s. 211 of the Penal Code, but directed that the case under s. 211 of the Penal Code should be retried.

It is now urged that the Sessions Judge had no power to pass such an order, and that the power to order a new trial conferred on him by s. 423 (1) (*b*) can only be exercised when the conviction and sentence is set aside for want of jurisdiction in the Magistrate who has tried the case. In support of this contention, the remarks of Brodhurst, J., in *Queen-Empress* v. *Sukha* (1) have been cited. These remarks are, however, *obiter dicta*, and as regards the point decided in the case, *viz.*, as to the power of an appellate Court to order the committal of cases to the Court of Sessions, the decision has been dissented from in the cases of *Queen-Empress* v. *Maula Baksh* (2), *Queen-Empress* v. *Abdul Rahaman* (3), and *Misri Lal* v. *Bajpie* (4).

[174] On a consideration of the terms of s. 423 (1) (*b*) (1), we think there is nothing to limit the power of an appellate Court to order a retrial. This seems to us to be expressly laid down in the case of *Queen-Empress* v. *Maula Baksh* (2), where it is said: "We find nothing in s. 423 of Act X of 1882 to limit the power of the Sessions Judge to do any of the acts which he, as an appellate Court, is empowered to do by sub-cl. 1 of cl. (*b*) of s. 420." Again, in *Queen-Empress* v. *Jabanulla* (5), it is said: "Section 423, cl. (*b*), has no such restriction imposed upon it. There is under that clause only one restriction to the power of the appellate Court on an appeal from a conviction, and that is that it cannot enhance the sentence." We may add that the ground taken in this rule by the learned counsel for the appellant was not taken in the written petition to this Court. The question raised in the petition is as to the discretion of the Judge in remanding the case after the prosecution had had full opportunity of proving their case.

We are accordingly of opinion that there is no legal defect in the order passed by the Sessions Judge in this case, and we discharge the rule.

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(1) 8 A. 14. (2) 15 A. 205. (3) 16 B. 580.
(4) 23 C. 350. (5) 23 C. 975.

27 C. 174=4 C.W.N. 307.

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CRIMINAL REVISION.

27 C. 174=4 C.W.N. 307.

CRIMINAL REVISION.

Before Mr. Justice Sale and Mr. Justice Stanley.

ISHAN CHANDRA KALLA AND ANOTHER (*Petitioners*) v. DINA NATH BADHAK (*Opposite-party*).* [3rd October, 1899.]

Criminal Procedure Code (Act V of 1898), *s.* 522—*Restoration of possession of property —Use of criminal force—Penal Code (Act XLV of* 1860), *s.* 350.

In order to support an order under s. 522 of the Criminal Procedure Code (V of 1898) there must be a finding that the dispossession was by the use of criminal force as defined in s. 350 of the Penal Code.

Ram Chandra Boral v. *Jityandria* (1) approved of.

[F., 25 A. 341 (343)=23 A.W.N. 59; 5 C.W.N. 250 (252); F. & Com., 11 C.W.N. 467 (469)=5 Cr.L.J. 278; R., 4 Cr.L.J. 293=12 P.R. 1906 Cr.=54 P.L.R. 1907; D., 15 P.R. 1914 (Cr.)=112 P.L.R. 1914=14 P.W.R. 1914 (Cr.)=15 Cr.L J. 275=23 Ind. Cas. 483.]

[175] ON the 8th of June 1899 the opposite party lodged a complaint against the petitioners in the Court of the Sub-divisional Magistrate of Uluberia, charging them with having committed trespass. The Magistrate convicted the petitioners under s. 448 of the Penal Code and sentenced them to pay a fine of Rs. 10 each, and also passed an order, under s. 522 of the Criminal Procedure Code, restoring possession of the disputed property to the opposite party, but there was no finding that the dispossession complained of was attended by criminal force.

Mr. *M. Huq*, for the petitioner.

Babu *Boidya Nath Dutt*, for the opposite party.

The judgment of the High Court (SALE and STANLEY, JJ.) was as follows :—

JUDGMENT.

We think that this rule must be made absolute, and our reason for so thinking is that there is no sufficient finding that the dispossession complained of was attended by criminal force such as is contemplated by s. 522, Code of Criminal Procedure. According to the ruling in *Ram Chandra Boral* v. *Jityandria* (1), in order to support an order under s. 522 of the Code of Criminal Procedure, there must be a finding that the dispossession was by the use of criminal force as defined in s. 350 of the Indian Penal Code. There has been no such finding here, and the result is that the order made under s. 522 of the Code of Criminal Procedure must be set aside and the rule made absolute.

S. C. B.

* Criminal Revision No. 633 of 1899, made against the order passed by Babu M. C. Ghose, Deputy Magistrate of Uluberia, dated the 10th of July 1899.

(1) 25 C. 434.

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27 C. 175.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

RAKHAL RAJA (*Petitioners*) *v.* KHIRODE PERSHAD DUTT (*Opposite Party*).* [17th July, 1899.]

Sentence—Enhancement of sentence - Criminal Procedure Code (*V of* 1898), s. 423—*Alteration of sentence on appeal—Effect of alteration.*

A sentence of three months' imprisonment was on appeal altered by the Sessions Judge to one month's imprisonment with a fine of Rs. 20, or in default of payment to 15 days' rigorous imprisonment. This alteration of [176] sentence was held not to amount to an enhancement of the sentence such as was contrary to the terms of s. 423 of the Criminal Procedure Code.

No general rule can be laid down to determine what is or is not an enhancement of sentence when only a portion of a sentence is altered to a punishment of a lesser degree of severity. In each case the Court has to consider what is the effect of the alteration.

Queen-Empress v. *Chagan Jagannath* (1) dissented from.

[R., 23 A. 497 (499) = 21 A.W.N. 176; 30 M. 103 (104) = 5 Cr.L.J. 36 = 16 M.L.J. 560 = 1 M.L.T. 375; 3 N.L.R. 90 (91); 36 A. 485 = 12 A.L.J. 827 = 15 Cr.L.J. 519 = 24 Ind. Cas. 607.]

THE petitioners were convicted under s. 147 of the Penal Code and sentenced to three months' rigorous imprisonment. On appeal, this sentence was altered by the Sessions Judge to one month's rigorous imprisonment and a fine of Rs. 20, and in default of payment to further like imprisonment for 15 days. The petitioners moved the High Court, and a rule was granted for the purpose of considering whether this alteration of sentence amounted to an enhancement such as was contrary to the terms of s. 423 of the Criminal Procedure Code.

Mr. *P. L. Roy*, and Babu *Dasarathi Sanyal*, for the petitioners.

Mr. *S. P. Sinha*, and Babu *Srish Chunder Chowdry*, for the opposite party.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows:—

JUDGMENT.

In this case the Magistrate sentenced the petitioners to three months' imprisonment. On appeal, this sentence was altered by the Sessions Judge to one month's imprisonment with a fine of Rs. 20, or in default of payment to 15 days rigorous imprisonment.

A rule was granted by us to consider whether this alteration of sentence amounted to an enhancement of the sentence such as was contrary to the terms of s. 423, Code of Criminal Procedure. Our attention has been drawn to the case of *Queen-Empress* v. *Chagan Jagannath* (1), as well as to a case in the Allahabad High Court, *Queen-Empress* v. *Ishri* (2), referred to in that judgment. We find it impossible to lay down any general rule to determine what is or is not an enhancement of sentence, when only a portion of a sentence is altered [177] to a punishment of a lesser degree of severity as in the case before us. Mr. Roy, who appears in support of the rule, contends that an appellate Court is not competent, under s. 423, to pass a sentence such as is

* Criminal Revision No. 446 of 1899, made against the order passed by B. L. Gupta, Esq., Sessions Judge of Hooghly, dated the 3rd of June 1899.

(1) 23 B. 439. (2) 17 A. 67.

now under consideration; that is to say, an appellate Court cannot modify a substantive sentence of imprisonment by directing that, for a portion of that term of imprisonment, a sentence of fine shall be substituted. He contends that to "reduce a sentence," as provided for by s. 423, cl. (*b*) is to lessen the particular punishment in the sentence, and that to "alter the nature of the sentence" is to pass sentence of a lesser degree of punishment—that is, to alter the sentence as a whole; that an appellate Court can convert a sentence of imprisonment into one of fine, but that no power is given to alter the nature of the sentence in part so as to leave the nature of the unaltered part unchanged.

We cannot accept this interpretation of the meaning of an alteration of sentence. As we read s. 423, cl. (*b*), (3) there is nothing to prevent an appellate Court from altering a portion of a sentence under appeal so long as it does not thereby enhance the same. Such an alteration would as a matter of fact be both a reduction and alteration of the original sentence, and it would not necessarily be an enhancement. What does or does not amount to an enhancement depends, in our opinion, on the terms of the alteration. We are not prepared to accept the principle on which the learned Judge of the Bombay High Court proceeded, for it may be that the fine imposed in substitution for a portion of a sentence of imprisonment may be so heavy as to make the altered sentence really an enhancement of the original sentence. It is also undesirable, in determining such a matter, that the alternative term of imprisonment imposed on default should be taken into consideration. That is not the real sentence, but a sentence that, under certain circumstances, may be made the sentence. Moreover the law (s. 70, Penal Code) does not release a person who has undergone such an alternative sentence of imprisonment from liability to pay the fine. It is sufficient for us in this case to hold that such an alteration of sentence is not necessarily an enhancement. In each case it would be for **[178]** the Court of revision, which is called upon to determine whether there has been an enhancement of sentence, to consider what is the effect of the alteration. In the present instance, we think that substitution of a sentence of fine of 20 rupees for two months' rigorous imprisonment cannot be regarded as an enhancement of sentence. The Sessions Judge certainly did not regard his order as an enhancement of the sentence, and we have no doubt that the petitoners themselves would not consent to receive the original sentence in substitution of that which has been passed. The rule is therefore discharged.

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27 C. 178.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Hill.

PRAMADA SUNDARI DEBI (*Representative of Plaintiff*) *v.* KANAI LAL SHAHA (*Defendant*).* [1st March, 1899.]

Land Registration Act (Bengal Act VII of 1876), s. 78—*Suit for rent—Legal representative of registered proprietor—Landlord and tenant.*

A suit for rent was instituted by the registered proprietor of an estate, who died during the pendency of the suit. His widow, the present plaintiff, was then substituted on the record in his place, but her name was not registered

* Appeal from Appellate Decree No. 1596 of 1897, against the decree of A. E. Staley, Esq., District Judge of Rajshahe, dated the 21st of May 1897, affirming the decree of Babu Upendra Chandra Ghose, Munsif of Natore, dated the 15th of December 1896.

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under the provisions of the Land Registration Act before the disposal of the suit in the first Court.

Held, that as the present plaintiff was claiming rent due to the deceased plaintiff in a representative character, s. 78 of the Land Registration Act did not bar her claim, and she was entitled to a decree.

Belchambers v. *Hussan Alli Mirza* (1) followed.

BADYA NATH BISHI brought a suit for rent on account of a *putni taluk* against the defendant Kanai Lal Shaha, claiming cesses and damages, and alleging the annual rent to amount to Rs. 82-15-3 pies. The suit was instituted on the 9th April 1896. [179] Badya Nath, whose name was registered as proprietor of the estate, died during the pendency of the suit, and his widow and heiress, Pramada Sundari Debi, was substituted in his place, under an order of the Court dated the 9th July 1896.

The defendant, in a written statement, dated the 21st August 1896, objected to the suit proceeding, on the ground that the name of Pramada Sundari Debi was not registered in the Collectorate. He also alleged that the annual rent was Rs. 72-11-3 pies only, and that he was liable to pay only three-fourths thereof, and objected to the claims for cesses and damages as excessive.

The Munsif dismissed the suit on the ground that, although the present plaintiff was rightly substituted in the place of the original plaintiff, and the suit was rightly allowed to proceed, it must fail for want of registration of her name in the Collectorate before decree. Upon the other issues, however, he held, that should the plaintiff succeed in the appellate Court on the question of registration, she would be entitled to a decree for three-fourths of the rent, &c., at the rate admitted by the defendant and damages at half the rate claimed.

On appeal, the District Judge upheld the decree of the Munsif, and dismissed the appeal.

The plaintiff appealed to the High Court.

Babu *Pramatha Nath Sen*, for the appellant.

Babu *Kishori Lal Sarkar*, for the respondent.

The judgment of the High Court (MACPHERSON and HILL, JJ.) was as follows:—

JUDGMENT.

We think both the lower Courts are wrong in holding that the provisions of s. 78 of Bengal Act VII of 1876 place any obstacle in the present plaintiff's way.

The suit was instituted by the plaintiff as proprietor of an estate to recover the *putni* rent which was due to him as proprietor. He died during the pendency of the suit, and his widow was substituted in his place. According to the plaintiff the substitution was as widow and heiress; according to the District Judge's judgment, it was as executrix under her husband's will.

We do not think it makes much difference in what capacity she was substituted. Both the Courts have held that the substituted [180] plaintiff's name not being registered under the provisions of Act VII to which we have referred, the present suit cannot proceed at her instance.

In our opinion it cannot be said that the substituted plaintiff is claiming rent which is due to her as proprietor of the estate. She is claiming money which was payable by defendant to the person who was the proprietor up to the time of his death, and she is claiming it in a

(1) 2 C.W.N. 493.

representative character. Section 78 of Bengal Act VII of 1876 was not intended to and does not cover a claim of this description. 1899 MARCH 1.

This point was raised and decided in the case of *Belchambers* v. *Hussan Alli Mirza* (1). I certainly see no reason to change the opinion that I then formed of the operation of that section. APPELLATE CIVIL.

We set aside the decree of the lower appellate Court, and the parties agree that there should be a decree according to the terms set out in the Munsif's judgment. The decree will be drawn up accordingly, and the appellant will be entitled to costs in all the Courts. 27 C. 178.

M. N. R. *Appeal decreed.*

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27 C. 180.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ghose.

KAMALA KANT SEN (*Plaintiff*) *v.* ABUL BARKAT *alias* HABIBULLA AND OTHERS (*Defendants*).* [29th August, 1899.]

Limitation Act (*XV of* 1877), *sch. II, art.* 132—*Sale for arrears of Revenue—Lien of Mortgagee on balance of sale-proceeds—Limitation Act, sch. II, arts.* 62, 97, 120—*Transfer of Property Act* (*IV of* 1882), *s.* 73—*Mortgage suit—Charge on proceeds of revenue sale—Revenue-paying estate—Act XI of* 1859, *s.* 53.

When a mortgaged property, being a revenue-paying estate, is sold free from all incumbrances for arrears of revenue, the lien of the mortgagee is transferred from the property itself to the balance of the sale-proceeds which remains after satisfying the Government demand.

The time within which a suit can be brought to recover money charged on a mortgaged estate is not, therefore, shortened by reason of the estate **[181]** having been sold for arrears of Government revenue; in such a case, a suit brought by the mortgagee for satisfaction of the mortgage-debt out of the surplus sale-proceeds will be governed by art. 132 of the Limitation Act.

Even if the original cause of action of the mortgagee to enforce a charge on the mortgaged property be considered to cease when the property was sold for arrears of revenue, and if it be considered that a new cause of action then accrued to him, so as to entitle him to bring a suit for the recovery of the surplus sale proceeds, art. 120 of the Limitation Act would apply to such a suit.

Ram Din v. *Kalka Prasad* (2), and *Miller* v. *Runga Nath Moulick* (3), distinguished.

[**F.**, 3 C.L.J. 52 (57); **R.**, 33 A. 708 (726) = 8 A.L.J. 854 = 11 Ind. Cas. 145; 31 C. 745 (751); 33 C. 92 = 9 C.W.N. 989; 33 M. 429 = 5 Ind. Cas. 92 = 20 M.L.J. 330 (336) = 7 M.L.T. 143; 5 C.W.N. 356; 3 N.L.R. 81; **D. & Expl.**, 14 C.W.N. 186 = 5 Ind. Cas. 70 (71).]

THE plaintiff, Kamala Kant Sen, who instituted the present suit on the 5th August 1895, alleged that the defendant No. 1, Abul Barkat *alias* Habibulla, borrowed from him the sum of Rs. 200, under a registered *kat-kobala*, dated the 29th of Cheit 1246 M.S., corresponding to the 10th April 1885, agreeing to pay Rs. 120 as profits per annum, and on default interest thereon, and to repay the debt within one year. It was further alleged that the mortgaged property was transferred to Raisunnessa, the defendant No. 2, and to two other persons, the defendants Nos. 3 and 4; that, at last, when it was in the proprietary possession of the defendant

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* Appeal from Appellate Decree No. 1707 of 1897, against the decree of G. Gordon, Esq., District Judge of Chittagong, dated the 31st of May 1897 reversing the decree of Mr. P. N. Banerjee, Subordinate Judge of that District, dated the 29th of September 1896.

(1) 2 C. W. N. 493. (2) 7 A. 502 = 12 I.A. 12. (3) 12 C. 389.

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No. 2, it was sold by auction for arrears of revenue on the 5th March 1891, and fetched the sum of Rs. 5,150; and that of the said sale-proceeds there was a surplus of Rs. 4,353-2-6 pies, which the defendant No. 2 withdrew through the defendant No. 4. The plaintiff prayed that as the mortgaged property had been converted into cash, a decree might be passed directing the defendants to pay the mortgage-debt, and on failure thereof, directing the same to be "paid out of the consideration of the property covered by the *kat.*"

The defendant No. 2 contested the suit; she alleged that she knew nothing about the mortgage; that the share of the defendant No. 1 in the *mehal* mortgaged in execution of a decree and purchased by her in August 1885; that Ahsanulla, a co-sharer, having defaulted to pay the Government revenue due by him, the entire *mehal* was put up to sale in 1886 and was purchased by one Hamedulla, who transferred the same to her; [182] that she was the owner of the entire *mehal* sold, according to her, free from all incumbrances, and that the defendant No. 1 and the plaintiff had no right to the said surplus sale-proceeds. She further contended that the suit was barred by limitation.

The Subordinate Judge held that the suit was not barred by limitation, as art. 132 of the Limitation Act applied to the case. He also decided the other issues affecting the merits of the case, and gave a decree in a modified form against the defendant No. 2.

On appeal, the District Judge held, "in consideration of the general principles of limitation and with special reference to" arts. 97 and 62 of the Limitation Act, that the suit was barred by limitation.

The plaintiff appealed to the High Court.

Babu *Jatra Mohan Sen*, and Babu *Dhirendra Lal Kastagir*, for the appellant.

Moulvie *Mahomed Yusoof*, Moulvie *Serajul Islam*, and Babu *Dwarka Nath Chakravarti*, for the respondents.

The judgment of the High Court (MACPHERSON and GHOSE, JJ.,) was as follows:—

JUDGMENT.

The facts of this case appear to be these: In April 1885 the first defendant borrowed a sum of money from the plaintiff, which was to be paid within a year, and as security for the re-payment of it he mortgaged by way of conditional sale his share in a revenue-paying estate. The first defendant's interest in that estate was then sold in execution of a money decree which was obtained against him and was purchased by the second defendant. In 1886 the estate was sold for arrears of Government revenue and was purchased by the third defendant, who again sold it to the second defendant. It does not much matter whether the third defendant was or was not, as the first Court found, a *benamidar* for the second defendant. The second defendant was one of the defaulting owners who obtained the property either by purchase at the revenue sale or by purchase from the purchaser at that sale, and as such under s. 53 of Act XI of 1859 he obtained the property subject to all existing incumbrances. In March 1891 the entire estate was again sold for arrears of Government [183] revenue and was purchased by a third party. The second defendant took out the surplus sale-proceeds, amounting, it is said, to Rs. 4,353, and on the 5th August 1895 the plaintiff brought this suit to recover from the defendants the amount due on his mortgage, praying, it may be somewhat vaguely, that the Court would direct it to be

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paid out of the consideration money of the property, meaning apparently the surplus sale proceeds appropriated by the second defendant. The second defendant who alone contested the suit raised a plea of limitation. This was overruled by the Subordinate Judge, but was accepted by the District Judge, who without going into any of the other questions raised dismissed the suit as barred by limitation, holding that either art. 97 or art. 62 of the Limitation Act applied.

In our opinion the decision of the Subordinate Judge is right and that of the District Judge wrong. This was not a suit to enforce as against the mortgagor the remedy which the plaintiff had on a personal covenant to pay. It was a suit to enforce a lien upon the property; but that property is beyond the reach of the mortgagee owing to its sale for arrears of Government revenue, and the lien has been transferred from the property itself to the balance of the money which remained after satisfying the Government demand. The plaintiff's cause of action is the non-payment of the money which was a charge upon the property; and the circumstance that owing to the defendants' default to pay the Government revenue the property has been sold, does not, it seems to us, in any way affect the cause of action which the plaintiffs had, or limit the time within which he would be entitled to bring the suit if the property is still available.

We have been referred to the observations of their Lordships of the Judicial Committee in the case of *Ram Din* v. *Kalka Prasad* (1) in which it is said that art. 132 should be read as having reference only to suits for money charged upon immoveable property to raise it out of that property. In the case of *Miller* v. *Runga Nath Moulick* (2), Mitter, and Norris, JJ. put the same construction upon that article, saying that it referred only to suits to enforce payment of money charged on immoveable property by the sale of that property. The questions raised **[184]** in both those cases were very different from the questions raised in this case. There the plaintiffs sought to extend the period allowed by art. 132 of the Limitation Act to a claim upon the personal covenant of the mortgagor to pay, in other words, he contended that *that* article applied either to a claim to recover on the personal covenant or to recover the money as a charge upon the property. What was decided was that art. 132 would not cover the case of a plaintiff suing on the personal covenant, but that it only applied to suits brought to enforce the payment of the money. There is nothing in the cases to which we have referred inconsistent with the view we have now expressed if to the words "to raise the money out of the property" be added "or what is now a substitute for the property." Under s. 73 of the Transfer of Property Act, the lien which existed on the property charged is now transferred to the purchase money; and we do not see any thing in the Limitation Act which would shorten the time within which the plaintiff could sue to recover the money, the suit being a suit, not on the personal covenant, but a suit to recover the money as charged on the mortgaged property. We may also add that if it is to be considered that the plaintiff's original cause of action to enforce a charge on the property ceased when the property was sold for arrears of revenue, and that a new cause of action accrued to him then so as to entitle him to bring a suit for the recovery of the money which the mortgagor or his representatives had taken, then we think art. 120 would apply, and in that view the suit would be in time.

(1) 7 A. 502 = 12 I. A. 12. (2) 12 C. 389.

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The decree of the District Judge must, therefore, be set aside, and the case must go back in order that the lower appellate Court may determine all other questions which are raised in the appeal before it. All that we decide is that the plaintiff's claim to recover the mortgage money out of the sale proceeds is not barred by art. 132. What does or what does not form a part of the mortgage money, or what sum the plaintiff is entitled to recover as such, are questions which the Court disposing of the appeal will have to decide.

The appellant is entitled to his costs in this appeal.

M. N. R. *Appeal allowed*; *case remanded.*

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27 C. 185.

[185] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Wilkins.

AMAN ALI (*Defendant*) *v.* AZGAR ALI MIA (*Plaintiff*).*
[7th July, 1899.]

Mortgage—Limitation—Mortgage by conditional sale—Mortgagee in possession—Suit for foreclosure and recovery of possession—Redemption.

A mortgagee by conditional sale, who was put into possession of the mortgaged property from the date of the mortgage and who is entitled under the deed to hold possession, is entitled, when wrongfully dispossessed, to recover possession of the property by a suit brought within time, although his claim for foreclosure may be barred by limitation. The possession recovered is, however, possession as mortgagee subject to the mortgagor's right of redemption.

[F., 7 C.W.N. 11 (20); R., 22 Ind. Cas. 65 (67)=9 N.L.R. 179.]

THIS appeal arose out of a suit for foreclosure and possession, based on a deed of conditional sale, executed by one Mahomed Kalan Chowdhry on the 27th Joisto 1228 Mughi, corresponding to the 9th June 1866, in favour of the plaintiff, Azgar Ali Mia. The defendants Nos. 1 to 6 are the heirs and representatives of the said Kalan Chowdhry, and the defendant No. 7, Aman Ali, is the purchaser of the mortgaged property at a sale in execution of a decree against the defendants Nos. 1 to 6. The deed of conditional sale was executed in consideration of a sum of Rs. 80, and contained a stipulation that on the seller paying back the purchase money within eight years from the date of sale, the land and the purchase deed should be returned to him, and that on failure of such payment being made, the sale should become absolute.

The plaintiff alleged that he was in possession of the mortgaged property from the date of the mortgage to the year 1254 Mughi enjoying the profits thereof and paying rent to the superior landlord; that the defendants, though asked by the plaintiff, refused to pay the principal amount of the debt; and that in the beginning of the month of Baisakh 1255 Mughi, the defendant No. 7, in conjunction with the other defendants, took possession of the mortgaged property and illegally dispossessed [186] the plaintiff from the same. On the 6th June 1896, the plaintiff

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* Appeal from Appellate Decree No. 83 of 1898, against the decree of Babu Shyam Kishore Bose, Subordinate Judge of Chittagong, dated the 24th of September 1897, modifying the decree of Babu Pran Krishna Biswas, Munsif of Fatikcheri, dated the 19th of January 1897.

accordingly brought the present suit to recover possession of the land with mesne profits, also for foreclosure.

The Munsif passed the usual foreclosure decree in favour of the plaintiff, holding that, although the plaintiff did not appear to have been in actual possession of the mortgaged property, yet under art. 147 of the Limitation Act, the claim for foreclosure was not barred by limitation.

On appeal by the defendant No. 7, the Subordinate Judge held that the plaintiff's claim for foreclosure was barred by limitation, the suit having been brought more than twelve years after the expiry of eight years from the date of the mortgage. He, however, found that the plaintiff was in possession of the mortgaged property within four or five years before the institution of the suit, decreed the plaintiff's claim for possession as mortgagee, and with this modification dismissed the appeal.

The defendant No. 7 appealed to the High Court.

Moulvie *Serajul Islam*, for the appellant.

Babu *Harendra Narain Mittra* (for Moulvie *Syed Shmsul Huda*), for the respondent.

The judgment of the High Court (MACPHERSON and WILKINS, JJ.) was as follows :—

JUDGMENT.

The plaintiff respondent brought this suit for foreclosure of a mortgage by way of conditional sale, and for possession of the property mortgaged, alleging that he had been put into possession by the mortgagor, and that he had been dispossessed some two or three years before the suit. The Subordinate Judge held that the claim for foreclosure was barred by the law of limitation, but that the respondent was entitled to possession as mortgagee of the property from which he had been ejected. This appeal is preferred by one of the defendants against the order giving the respondent possession of the mortgaged property.

It seems to us that the decision of the Subordinate Judge is right. The property was conveyed to the respondent for a consideration of 80 rupees, and under the deed he was entitled to possess and enjoy the property. There was this condition, however, that, if the consideration money was repaid within eight years, the deed [187] would be returned and possession restored ; and that, failing such repayment, the plaintiff would be entitled to foreclosure and make this title absolute. The mere fact that the plaintiff's claim for foreclosure was found barred by limitation cannot, it seems to us, deprive him of the possession to which he was entitled under the deed. It was held in the case of *Khelut Chunder Ghose* v. *Tara Churn Koondoo Chowdhry* (1) that a mortgagee under a deed such as this, who is entitled to possession on default of payment of the mortgage-debt, can maintain a suit for possession without asking for foreclosure ; and that the right which he has to possession is not affected by the right which he has to foreclose. He has the double right. It seems to us that a mortgagee who was put into possession from the first, and is entitled under the deed to hold possession, is in no worse position than a mortgagee who is only entitled to possession on default of payment by the mortgagor of the mortgage debt. It has been found that the respondent was wrongfully deprived of possession, and that the suit to recover possession was within time. On the facts as set out in the plaint, we think that the Subordinate Judge was justified in giving the respondent a decree for

(1) 6 W.R. 269. (See S. C. on appeal, 14 M. I. A. 144=8 B. L. R. 104.)—Rep.

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possession, although his claim for foreclosure fell through. The possession, as stated by the Subordinate Judge, is of course possession as mortgagee subject to the right of redemption.

This appeal is dismissed with costs.

M. N. R. *Appeal dismissed.*

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27 C. 187.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Hill.

MAJED HOSSEIN (*Judgment-debtor*) *v.* RAGHUBUR CHOWDHRY AND ANOTHER (*Decree-holders*).* [15th August, 1899.]

Civil Procedure Code (Act XIV of 1882), s. 244—Question for Court executing decree—Transferability of occupancy holding according to custom or usage—Saleability of occupancy holding in execution of decree.

[188] When an application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment-debtor is entitled, under s. 244 of the Civil Procedure Code, to raise the question as to whether the holding is saleable according to custom or usage, and to have that question determined by the Court executing the decree.

[F., 4 C.W.N. 571 (572); R., 14 C.L.J. 620 (626) = 10 Ind. Cas. 417; 11 C.W.N. 83; 2 Ind.Cas. 96; 5 Ind Cas. 385 (386); D., 4 C.W.N. 679 (680).]

THE judgment-debtor objected to the sale of a *jote* in execution of what was practically an ordinary money decree against him, on the ground that the holding was not transferable. The Munsif held that the objection came under s. 244 of the Civil Procedure Code, and that it was for the decree-holders to prove that the holding was transferable, but as they gave no evidence on the point, he allowed the objection.

On appeal, the Subordinate Judge held that the question did not properly arise under s. 244 of the Civil Procedure Code, as any decision of the Court executing the decree on the point would not bind the landlords of the judgment-debtor. He accordingly sent back the execution case to the lower Court to allow the decree-holders to bring the holding to sale. The judgment-debtor appealed to the High Court.

Babu *Jagesh Chandra Dey*, for the appellant.

Babu *Akshay Kumar Banerjee*, for the respondents.

The judgment of the High Court (GHOSE and HILL, JJ.) was as follows :—

JUDGMENT.

As we understand the facts in this case, they are shortly these. A certain person obtained a decree which, to all intents and purposes, may be regarded as a decree for money. He transferred that decree to the petitioners in the Court below, and they applied for attachment and sale of a certain occupancy holding belonging to the judgment-debtor. The question raised before the Court of first instance was whether this occupancy holding was transferable according to custom or usage. The applicants for attachment and sale did not, upon the date fixed for trial,

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* Appeal from Order No. 15 of 1899, against the order of Babu Nilmoni Das, Subordinate Judge of Tirhoot, dated the 15th of October 1898, reversing the decree of Babu Prayag Nath, Munsif of Somastipur, dated the 19th of August 1898.

adduce evidence upon this matter, and the Munsif held that they were not entitled to sell the said occupancy holding. There was then an appeal preferred to the higher Court, and in this appeal the Subordinate Judge has held, if we understand him correctly, that the question whether the occupancy holding was saleable or not according to custom or usage could not at that stage be determined under [189] s. 244 of the Code of Civil Procedure; and he has accordingly ordered that the property be sold.

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We think that the Subordinate Judge has taken an erroneous view of the question raised before him. We are of opinion that it was quite competent to the judgment-debtor to raise the question at the stage that he did raise it, namely, that the holding was not saleable, and that, therefore, the applicants were not entitled to attach it and put it up for sale. If the question could be determined at a later stage of the proceedings, as the Subordinate Judge seems to think, we fail to understand why it could not be dealt with at the very outset, namely, when the application was made to attach and sell the holding. The question raised clearly falls, in our judgment, within s. 244 of the Code of Civil Procedure, and therefore, it was necessary for the Subordinate Judge to deal with it. We may refer the Subordinate Judge to a recent decision of this Court in the case of *Durga Charan Mandal* v. *Kaliprasanna Sarkar* (1) and also to the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) quoted in that decision. We think that the principle that underlies both these cases applies to this case as well.

In this view of the matter, the order of the Subordinate Judge cannot be sustained; but at the same time, it being doubtful whether the parties appreciated the true question between them in proper time, we think it would be right and proper to allow the applicants an opportunity of proving, if they can, that the holding which they asked to be attached and put up for sale is saleable according to custom or usage. We accordingly set aside the orders of both the lower Courts, and send back the case to the Court of first instance in order that the question raised between the parties may be tried out after allowing them an opportunity of adducing evidence upon it.

The costs of this Court and also the costs of the lower Courts will abide the result.

M. N. R. *Appeal allowed : case remanded.*

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27 C. 190.

[190] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Stevens.

ABDUL KARIM (*Defendant No.* 2) v. SALIMUN (*Plaintiff.*)*
[24th July, 1899.]

Transfer of Property Act (IV of 1882), *s.* 59—*Attestation of mortgage bond—Meaning of the word* "*attested*"—*Evidence Act* (*I of* 1872), *ss.* 68, 69, 70, 71—*Admission of execution.*

The *attestation* required by s. 59 of the Transfer of Property Act is an attestation by witnesses of the *execution* of the document, and not of the *admission* of execution.

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* Appeal from Appellate Decree No. 243 of 1898, against the decree of H. Holmwood, Esq., District Judge of Gya, dated the 29th of September 1897, reversing the decree of Babu Baroda Prosunno Shome, Subordinate Judge of that District, dated the 31st of March 1897.

(1) 26 C. 727. (2) 24 C. 355.

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27 C. 190.

The word "admission" in s. 70 of the Evidence Act relates only to the admission of a party *in the course of the trial of a suit,* and not to the attestation of a document by the admission of the party executing it.

Girindra Nath Mukerjee v. *Bejoy Gopal Mukerjee* (1) followed.

[**Diss.**, 26 A. 69 (70); 27 B. 91 (93, 94 and 95); **N.F.**, 6 A.L.J. 737; **F.**, 31 M. 216=18 M.L.J. 219=3 M.L.T. 200; 9 C.W.N. 1001; 11 Ind. Cas. 689=7 N.L.R. 85; **R.**, 32 C. 494=1 C.L.J. 118=9 C.W.N. 372; 32 C. 729 (732)=9 C.W.N. 697; 37 C. 526=11 C.L.J. 563=14 C.W.N. 974=5 Ind. Cas. 539; 23 A.W.N. 201; 11 Ind. Cas. 225 (226); **D.**, 13 C.W.N. 40=3 Ind. Cas. 309.]

THE plaintiff, Mussummat Bibi Salimun, brought the present action for recovery of a debt under a mortgage bond, and the suit was originally decreed against all the defendants. Afterwards, on the application of Sheik Abdul Karim, defendant No. 2, that decree was set aside and the case restored to the file. The main defence of the said defendant was that he did not execute the bond, and that he did not receive any part of the consideration money. In the course of the trial two attesting witnesses were called by the plaintiff, namely, M. Furhat Hossain and M. Vilayat Hossain. Furhat Hossain said that he attested the bond on the admission of the executants as to execution of it. The other witness, Vilayat Hossain, made conflicting statements. In cross-examination he said, "perhaps defendant No. 2 signed his name on the bond in a feigned hand." In his re-examination he confessed that he did not remember whether or not the bond was signed in his presence. The Subordinate Judge held that, although both the witnesses swore to the admission of execution by Abdul Karim, that was not sufficient proof of the execution of the bond, regard being had to the express provisions of s. 68 of the Evidence Act. He was, further, not satisfied on the evidence that defendant No. 2 actually signed the mortgage bond, **[191]** and accordingly dismissed the suit as against the defendant No. 2, and decreed it as against the other defendants.

The plaintiff appealed to the District Judge. It was contended on behalf of the plaintiff that, as regards the attestation of the bond by the witnesses, if the appellant was met by s. 59 of the Transfer of Property Act and s. 68 of the Evidence Act, the admission of the defendants to M. Furhat Hossain, read with s. 70 of the Evidence Act, was a complete answer. With regard to this point, the learned District Judge remarked as follows in his judgment:—

"The question is whether this admission operates under s. 70 of the Evidence Act to get rid of the actual absence of proof under s. 68 of the Evidence Act that the mortgage was duly executed in the manner laid down by s. 59 of the Transfer of Property Act. If one witness is called under s. 68, Evidence Act, that witness must of course prove that the document was signed by the executants in his presence, and attested by himself and at least one other witness. Here there is no such evidence; but it is clear that the present defendant, Abdul Karim, admitted execution to M. Furhat Hossain after he had signed the bond and before M. Furhat Hossain attested it. The admission of a party to a document will, so far as such party is concerned, supersede the necessity either of calling the attesting witness or of giving any other evidence. The Subordinate Judge appears not to have considered the bearing of s. 70."

Holding this view, and being of opinion that Abdul Karim undoubtedly executed the mortgage bond and that his admission of the fact to M. Furhat Hossain was binding on him, the District Judge decreed the appeal.

(1) 26 C. 246.

1899 JULY 24. — APPELLATE CIVIL. — 27 C. 190.

The defendant No. 2 then appealed to the High Court.

Moulvi *Mahomed Mustafa Khan*, for the appellant.

No one appeared for the respondents.

The judgment of the High Court (GHOSE and STEVENS, JJ.) was as follows:—

JUDGMENT.

The only question with which we are concerned in this appeal is whether the mortgage security upon which the suit of the plaintiff was founded was executed by the defendant No. 2, Sheikh Abdul Karim, the appellant before us, as provided by law.

Section 59 of the Transfer of Property Act provides that " where the principal money secured is one hundred rupees or **[192]** upwards (and in this case the consideration is above one hundred rupees), a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses ;" and so on. It appears upon the statement of facts, made to us by the learned Vakil for the appellant (the respondent not being represented before us), that though there are several witnesses to the mortgage-deed in question, only two of them have been examined, namely, Vilayat Hossain and Furhat Hossain. So far as the first-named witness is concerned, it would appear from the judgment of Subordinate Judge that this witness was in no way certain whether he was present at the time when the executants put their signatures on the document; for he said in re-examination that he did not remember whether or not the bond was signed in his presence. And we observe that the learned Judge does not say that this witness proves any thing to the effect that the defendant No. 2 signed his name in his presence. On the contrary he states as follows : "If one witness is called under s. 68, Evidence Act, that witness must of course prove that the document was signed by the executants in his presence and attested by himself, and at least one other witness. Here there is no such evidence, but it is clear that the present defendant Abdul Karim admitted execution to Moulvi Furhat Hossain after he had signed the bond and before Moulvi Furhat Hossain attested it," and so on, clearly indicating that, save and except the evidence of Furhat Hossain, there is no other evidence to prove that the document in question was signed in his presence or in the presence of any other witness by the executants.

Referring, again, to the evidence of Moulvi Furhat Hossain the learned Judge says : " The admission of a party to the document will, so far as such party is concerned, supersede the necessity either of calling the attesting witness or of giving any other evidence." And later on, he states that the executants admitted before Moulvi Furhat Hossain that they had signed the deed and had received the consideration money.

The learned Judge, having regard to the evidence of the said witness, considers that the requirements of s. 59 of the Transfer of Property Act have been complied with ; and referring to the provisions of s. 70 of the Indian Evidence Act, he is of opinion that the admission of the executants, before this witness **[193]** is sufficient in law to make the mortgage deed in question a good and operative document. Section 68, however, of the said Act provides that "if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence." Now there can be no doubt that the document with which we are concerned

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is a document which was required by law to be attested; and here the question arises, what is the meaning of the word "attested" as used in s. 68 of the Evidence Act, and in s. 59 of the Transfer of Property Act. In a very recent case before this Court, namely, the case of *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee* (1) where a similar question was raised, a Divisional Bench of this Court (Maclean, C. J., and Banerjee, J.) observed as follows: "The attestation required by s. 59 of the Transfer of Property Act is an attestation by witnesses of the execution of the document and not of the admission of execution." We entirely concur in this observation. It distinctly meets the view which has been adopted by the learned District Judge in this case; for he is of opinion, as already stated, that the evidence of Moulvi Furhat Hossain is sufficient for the requirements of the law. It will be observed that s. 70 of the Evidence Act relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. And if we refer to ss. 68, 69, 70 and 71 of the Evidence Act, it will be found that they all relate to the evidence of witnesses or admission by parties at the trial, and have no relation to anything like that upon which the learned Judge has relied in holding that the admission before Moulvi Furhat Hossain by the executants satisfies the requirements of the law. We think, upon the facts as represented by the learned Vakil for the appellant and upon the facts as disclosed in the judgments of the Courts below, that there has not been an attestation of the mortgage bond in question within the meaning of s. 59 of the Transfer of Property Act.

In this view of the matter it follows that, so far as the defendant **[194]** No. 2 is concerned, the plaintiff is not entitled to enforce his mortgage lien. The appeal will, therefore, be allowed, and the decree of the lower appellate Court will be set aside, and that of the Court of first instance dismissing the plaintiff's suit as against the defendant No. 2 will be restored with costs in all the Courts.

M. N. R. *Appeal allowed.*

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27 C. 194.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

KULODA PROSAD CHATTERJEE AND OTHERS (*Plaintiffs*) v. JAGESHAR KOER (*Defendant*).* [7th June, 1899.]

Transfer of Property Act (IV of 1882), s. 39—Transferee for consideration and without notice—Mortgagee—Decree declaring charge on immoveable property for maintenance —Notice of charge—Constructive notice—Vendor and Purchaser.

Section 39 of the Transfer of Property Act does not protect a transferee for consideration, when the immoveable property transferred has already been declared by a decree of Court subject to a charge in favour of a Hindu widow for her maintenance. The fact that the maintenance claimed accrued due subsequent to the transfer does not affect the liability of the property transferred to be sold in execution of a decree for the maintenance so claimed.

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* Appeal from Appellate Decree No. 1624 of 1889, against the decree of Babu Nepal Chunder Bose, Subordinate Judge of Mozufferpur, dated the 26th of July 1897, affirming the decree of Babu Thakurdoyal, Munsif of Mozufferpur, dated the 15th of March 1897.

(1) 26 C. 246.

[F., 1 S L.R. 104 (105) ; 16 M.L.T. 551=25 Ind. Cas. 759 ; R., 37 B. 621=15 Bom. L. R. 809=21 Ind. Cas. 54.]

1899 JUNE 7. — APPELLATE CIVIL. — 27 C. 194.

THE defendant, Mussummat Jageshar Koer, instituted a suit in the Court of the Subordinate Judge of Mozufferpur against Ruderdeo Narain Sahi and Inderdeo Narain Sahi, for declaration of her right of inheritance to the properties left by her husband. On the 21st May 1886 she obtained a decree under a *solenamah*, declaring that 4 annas of each of the mouzahs Chakna and Kishunnagar was subject to a charge for her maintenance.

Subsequently, by a mortgage bond, dated the 18th September 1889, Ruderdeo Narain Sahi mortgaged 2 annas of mouzah Chakna, 2 annas of mouzah Kishunnagar, and some other properties to Babu Mahes Chunder Chatterjee, deceased, father of the plaintiffs. On the basis of that bond, and of another bond of a subsequent date, the plaintiffs obtained a decree to which [195] the defendant was not a party. In execution of that decree, the plaintiffs purchased the mortgaged property.

In execution of a decree for arrears of maintenance which fell due subsequent to the mortgage created in favour of the father of the plaintiffs, the defendant caused to be advertised for sale a portion of the mortgaged property which was also declared subject to the charge for maintenance. Upon that, the plaintiffs preferred an objection to the right of the defendant to bring the property to sale, but the objection was disallowed.

Hence the plaintiffs brought the present action for a declaration that the defendant had no mortgage lien on 2 annas of mouzah Chakna, and for a further declaration that the plaintiffs were entitled to have the said property absolved from liability to sale in execution of the defendant's decree. On the ground that neither the decree obtained by the defendant, nor the *solenamah* upon which it was based, was registered, the plaintiffs urged that the defendant had no mortgage lien preferential to their mortgage. The defendant, amongst other things, urged that she was not bound by the mortgage decree obtained by the plaintiffs, and that her mortgage lien was preferential to the mortgage lien alleged by the plaintiffs.

The Munsif held that the only issue was whether the share of the property purchased by the plaintiffs could be sold in execution of the decree obtained by the defendant, and finding the issue adversely to the plaintiffs, dismissed the suit.

On appeal, the Subordinate Judge held that the *solenamah* mentioned above did not *create* any right, but merely defined and made certain what was indefinite before, and that hence it was immaterial whether it was registered or not. He also held that the decree obtained by the defendant being one for a declaration and fixing of monthly allowance, it could be executed whenever the amount might fall into arrears during her lifetime. With reference to the contention that the plaintiffs were purchasers without notice, the learned Judge remarked as follows :—

"It is evident that their predecessors took a mortgage of the properties and caused such properties to be sold. They should be presumed to know everything about the title of their mortgagors in the properties. If the mortgagees or their representatives had inquired the title of the mortgagor, [196] which they should have done, they would have come to know that the mortgagor acquired the property by right of survivorship, and that the defendant had a lien over such property. If they failed to do so, they cannot claim to be purchasers without notice."

He accordingly dismissed the appeal.

The plaintiffs appealed to the High Court.

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Babu *Digambar Chatterjee*, for the appellants.

Babu *Lakshmi Narayan Sinha*, for the respondent.

The judgment of the High Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

The main contention raised in this appeal is that, having regard to the provisions of s. 39 of the Transfer of Property Act, the charge created in favour of the defendant under the compromise decree in 1886 could not affect the interest of the plaintiffs, because they (the plaintiffs) were persons who took the property without notice of the right of maintenance in the defendant, the widow. It appears to us, however, that s. 39 of the Transfer of Property Act has no application to a case like this, where there has been a decree between the widow on the one hand, and the plaintiffs' vendors on the other—a decree by which certain immoveable property was charged with the maintenance of the widow. The predecessor of the plaintiffs subsequently took a mortgage of the property from the defendant, against whom the said decree was passed; and therefore they are bound, in the same manner as their mortgagor was bound, by it. Then again the plaintiffs could hardly be said to be transferees without notice of the right of maintenance in the widow, because it does not appear that they, before they took a mortgage, made any inquiry as to the right of the widow, and whether any charge existed upon the property in question.

The learned vakil for the appellants has further argued that, inasmuch as the maintenance which was claimed by the defendant, and for which the property in question was attached and about to be sold, accrued due subsequent to his client's mortgage, the defendant should be regarded as second mortgagee, the plaintiffs being regarded as first mortgagees. But it is obvious that *that* argument cannot hold good, for the simple reason that **[197]** the defendant does not claim as mortgagee in the strict sense of the word, but she claims the right of maintenance which was declared by the decree, and by which decree certain specific immoveable property was charged with such maintenance.

Upon these grounds, we think this appeal should be dismissed, and we accordingly dismiss it with costs.

M. N. R. *Appeal dismissed.*

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27 C. 197.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

RAM NARAIN TEWARI AND OTHERS (*Plaintiffs*) *v.* SHEW BHUNJAN ROY AND OTHERS (*Defendants*).* [30th June, 1899.]

Right of suit—Fraud—Sale in execution of ex parte *decree—Suit to set aside a sale on the ground of fraud, challenging the decree in execution of which the sale took place as fraudulent, although the said decree was set aside on the ground of non-service of summons—Civil Procedure Code (Act XIV of* 1882), *ss.* 108 *and* 244.

An *ex parte* decree for rent was obtained against *A* and others, and in execution of that decree certain lands of the judgment-debtors were sold and were purchased by a third party. Subsequently, at the instance of *A*, the said *ex parte* decree was set aside on the ground of non-service of summons, and the

* Letters Patent Appeal No. 22 of 1899, in Appeal from Appellate Decree No. 143 of 1898.

1899 JUNE 30. APPELLATE CIVIL. 27 C. 197.

original suit was restored, but that was dismissed for default, as the then plaintiff did not proceed with it. An application was then made by *A* to set aside the sale on the ground of fraud which was rejected because the auction-purchaser was not made a party to the proceedings. *A* then brought a suit for declaration of title to a portion of the land sold and for confirmation of possession, challenging not only the sale, but also the decree, on the ground of fraud. The defence mainly was that regard being had to the provisions of s. 244 of the Civil Procedure Code the suit was not maintainable.

Held, that, although there was no decree to be actually set aside, the plaintiff was entitled to show that the decree under which the sale was held was obtained by fraud as against him, and that therefore the suit was maintainable.

Abdul Mazumdar v. *Mahomed Gazi Chowdhory* (1), and *Pran Nath Roy* v. *Mohesh Chandra Moitra* (2), referred to.

[R., 5 C.L.J. 328 (331); 7 Ind. Cas. 11 (14).]

[198] ONE Harnundan brought a suit for rent against the plaintiffs on the allegation that they held a joint holding under him, and obtained an *ex parte* decree on the 16th January 1894. In execution of the said decree the holding was sold and purchased by one Shew Bhunjan Roy, defendant No. 2, on the 18th June, 1894, and delivery of possession was given to him on the 25th December 1894. The plaintiffs then made two applications to set aside the decree and the sale, stating that they had no notice of the suit or of the execution proceedings. The application to set aside the decree was allowed, and the suit was restored to the file for retrial, but subsequently it was dismissed for non-appearance of Harnundan; the application to set aside the sale was rejected on the ground that the auction-purchaser was not made a party to it. The plaintiffs then brought the present suit for declaration of title to a portion of the land sold and for confirmation of possession, challenging not only the sale, but also the decree, on the ground of fraud. The defence of the auction-purchaser, who alone appeared, mainly was that the suit was barred under ss. 244 and 312 of the Civil Procedure Code, and was also barred by limitation.

The Court of first instance having decided the issues against the defendant, decreed the plaintiffs' suit.

On appeal to the Subordinate Judge he confirmed the said decision.

The defendant then appealed to the High Court, and STEVENS, J., sitting alone reversed the decision of the Courts below, and dismissed the suit, holding that s. 244 of the Civil Procedure Code was a bar to it.

Against this decision the plaintiffs appealed under s. 15 of the Letters Patent.

Mr. *C. Gregory*, for the appellants.

Dr. *Ashutosh Mookerjee*, for the respondent.

The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was as follows:—

JUDGMENT.

MACLEAN, C. J.—In this case I have the misfortune to differ from Mr. Justice Stevens, who has held that, having regard **[199]** to the provisions of s. 244 of the Code of Civil Procedure this suit is not maintainable.

Shortly the facts are these. There was a rent suit brought against the present plaintiff, and an *ex parte* decree was obtained against him on the 16th January 1894, and under that *ex parte* decree the property was put up for sale, and sold on the 10th June 1894, and the purchaser, who

(1) 21 C. 605.

(2) 24 C. 546.

1899 JUNE 30. — APPELLATE CIVIL. — 27 C. 197.

is the respondent on the present appeal, was put into possession on the 25th December in the same year. Subsequently, the present plaintiff, who was the defendant or one of the defendants in the former suit (our information as to the former suit is not very definite), applied to set aside the *ex parte* decree, not upon the ground of fraud, but upon the ground of non-service of the summons upon him, and that *ex parte* decree was set aside. We are not in possession of the actual date when this was done, but it is said that it was in September 1895. The ultimate fate of that suit was that as the then plaintiff did not proceed with it, it was dismissed for default.

On a date, which has not been given to us, the present plaintiff applied to set aside the sale to the present respondent, on the ground of fraud, and that application was rejected on the 21st August 1895, upon the ground that the auction-purchaser, the present respondent, was not made a party to the proceedings. On the 27th July 1896, he brings his present suit, in which he prayed for a declaration that his title to portions of the land sold had not been affected in any way by the fraudulent proceedings (which he alleged in his plaint) and for confirmation of his possession. The fraudulent proceedings of which he complained were not merely the sale of the property under the decree, but the whole proceedings in the suit, and especially the circumstances under which the *ex parte* decree was obtained, and the suit must be taken in effect as a suit challenging, not only the sale, but challenging the decree, on the ground of fraud.

Both the Munsif and the Subordinate Judge held that the suit was maintainable, and made a decree in the plaintiff's favour, but Mr. Justice Stevens has reversed their decision, holding that the plaintiff is barred by s. 244 of the Code of Civil Procedure. I am unable to share that view. The plaintiff's suit is **[200]** one not merely to set aside the sale (to which s. 244 would have been a bar), but virtually to have it declared that the whole suit, including the decree, was a sham, and fraudulent as against him. Such an issue could not have been tried under s. 244, the proceedings under which presuppose the existence of a valid and binding decree. It is perfectly true that as the *ex parte* decree was set aside, there is no decree of the previous suit now to be set aside, but it was set aside for want of due service of the summons on the present plaintiff, and not on the ground of fraud, which the plaintiff by his present suit desires to go into, and which he contends, if proved, will vitiate the whole of the proceedings including the sale. I can see nothing in s. 244, which prevents him from doing this, and I think that, even if there be now no decree to be actually set aside, the plaintiff is entitled to show that the decree, under which the sale was held, was obtained by fraud as against him, and this view appears to me to be consistent with the case of *Abdul Mazumdar* v. *Mahomed Gazi Chowdhry* (1) and the case of *Pran Nath Roy* v. *Mohesh Chandra Moitra* (2); nor do I think that it clashes with anything that has been said in the case of *Nemai Chand Kanji* v. *Deno Nath Kanji* (3), or in the cases of *Moti Lall Chakerbutty* v. *Russick Chandra Bairagi* (4), *Bhubon Mohun Pal* v. *Nunda Lal Dey* (5), and *Hira Lal Ghose* v. *Chundra Kanto Ghose* (6).

This proposition has not been seriously controverted by the respondent's learned vakil, but he urges that the learned Subordinate Judge has

(1) 21 C. 605. (2) 24 C. 546. (3) 2 C.W.N. 691.
(4) 26 C. 326, note. (5) 26 C. 324. (6) 26 C. 539.

not found as a fact that the decree was obtained by fraud, and he asks for a remand to have that issue determined. I think, however, looking at the judgment as a whole, that that is what the Subordinate Judge intended to find: otherwise it is difficult to appreciate why he should have referred to and relied upon the cases reported in Volumes 21 and 24, Calcutta Series, which I have just cited. He says: "Fraud being the key note [201] of the plaintiff's suit, it is saved from the operation of s. 244, as that section has been expounded by the case of *Abdul Mazumdar* v. *Mahomed Gazi Chowdhry* (1), and by the still more recent case of *Pran Nath Roy* v. *Mohesh Chandra Moitra* (2)." In these cases the distinction is drawn between suits in which the plaintiff asks, not only to set aside the sale, but also to set aside the decree, on the ground of fraud, and that distinction must, I think, have been present to the learned Subordinate Judge's mind.

1899 JUNE 30. — APPELLATE CIVIL. — 27 C. 197.

There are other passages in his judgment, which show that he was dealing with the question of fraud as to the decree and not merely as to the sale. For instance, he says, "the recent case quoted by the appellant of *Keshab Chunder Ghose* v. *Durga Tarini Ghosh* (3) does not at all touch the present case, inasmuch as the decree and the sale had not been aspersed as fraudulent." And again: "I agree with the Munsif in finding that Amir is the real beneficiary, and this finding goes a long way in bringing home the plea of fraud set up by the plaintiff," the plea of fraud being, not only in regard to the sale, but in regard to the decree.

I, therefore, think that the learned Subordinate Judge intended to find, and has found, that the decree in the previous suit was obtained by fraud, and, that being so, there is no reason which would justify us in remanding the case to have that issue retried. The appeal must be allowed, and the decree of the Subordinate Judge restored with costs, both before Mr. Justice Stevens and this Court.

BANERJEE, J.—I am of the same opinion.

S. C. G. *Appeal allowed.*

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27 C. 202.

[202] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

BIRAJ MOHINI DASSI, WIDOW OF TARINI CHARAN GHOSE (*Defendant*) v. GOPESWAR MULLICK AND OTHERS (*Plaintiffs*).*
[12th July, 1899.]

Bengal Tenancy Act (VIII of 1885)—Applicability of Act to lands outside the limits of the Town of Calcutta, but within its municipal boundaries—Calcutta Municipal Consolidation Act (Bengal Act II of 1888), s. 3—Town of Calcutta, Municipal boundaries of.

The Bengal Tenancy Act applies to lands situated outside the limits of the Town of Calcutta, but within its Municipal boundaries, as defined by Bengal Act II of 1888.

[R., 8 C.W.N. 301 (302).]

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* Appeal from Appellate Decree No. 1890 of 1897, against the decree of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 26th of July 1897, reversing the decree of Babu Shyam Chand Roy, Subordinate Judge of that District, dated the 31st of July 1896.

(1) 21 C. 605. (2) 24 C. 546. (3) 1 C.W.N. cxl.

1899 JULY 12. — APPELLATE CIVIL. — 27 C. 202.

THIS appeal arose out of an action brought by the plaintiffs for recovery of *khas* possession of a certain plot of land in Dihi Panchanogram situated outside the limits of the Town of Calcutta, but within its municipal boundaries. The allegation of the plaintiffs was that their predecessors held, and they subsequently have been holding, the land in dispute under the Government for a long time; that one Kailash Chunder Sarkar was the tenant at will of the said land, and that after his death the defendant, his sister, has been in possession of it as *sarbarakar* on payment of rent to them; and that, notwithstanding they served a notice to quit upon the defendant, she did not quit the land. They, therefore, prayed to recover *khas* possession of it.

The defence, *inter alia*, was that there was no relationship of landlord and tenant between the parties; that the claim of the plaintiffs was barred by limitation; that admitting that the defendant was a tenant, she acquired a right of occupancy to the disputed land, it being used for agricultural and horticultural purposes, and as such she could not be ejected; and that the notice to quit was not properly served upon her. It was found by the Courts below that the defendant was not occupying the land, but had let it out to sub-tenants.

The Court of first instance dismissed the suit holding that the defendant had acquired a right of occupancy to the disputed [203] land, and was not liable to be ejected. On appeal, the lower appellate Court having held that the Bengal Tenancy Act did not apply to the case, but that it came under the Transfer of Property Act, that the defendant was not a raiyat, and that she did not acquire any right of occupancy, decreed the plaintiffs' suit.

Against this decision the defendant appealed to the High Court.

Dr. *Rash Behary Ghosh*, and Babu *Purna Chander Shome*, for the appellant.

Babu *Nilmadhub Bose*, for the respondents.

The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was as follows :—

JUDGMENT.

MACLEAN, C.J. (BANERJEE, J., concurring).—This is an appeal from the judgment of the District Judge of the 24-Parganas in a suit in which the plaintiffs claim *khas* possession of some two or three bighas of land situated just outside the limits of the Town of Calcutta, but within its municipal boundaries as defined by Bengal Act II of 1888.

The defence set up in the written statement was a varied one; that the relation of landlord and tenant did not exist between the plaintiffs and the defendant; that the land was held in *mokurrari* and *mourasi* right; that the defendant had acquired a title by adverse possession; that the plaintiffs were barred by the statute of limitation, and that, if the defendant were a tenant under the plaintiffs, she was an occupancy raiyat. Of all these varied contentions, the last only has been argued before us. The first Court held that the defendant was an occupancy raiyat and was not liable to be ejected; the lower appellate Court reversed this decision; hence the present appeal. It is admitted that, before suit, proper notices to quit had been duly served on the defendant.

The first point argued before us on behalf of the appellant is that the Bengal Tenancy Act applies to the case, the land being outside the Town of Calcutta. The respondents contend that, having regard to Bengal Act II of 1888, the land in question is within the Town of Calcutta, and so

exempted from the operation of the Bengal Tenancy Act. I am unable to take the latter view. The term "Town of Calcutta" is one well recognized, and at the time of the passing of the Bengal Tenancy Act its boundaries **[204]** were well known and well defined, and that expression, as used in the Tenancy Act, can, in my opinion, only relate to the Town as it existed at the time of the passing of the Act. No doubt the area of the town has, for municipal purposes, been extended by the Act I have mentioned, and this land is within the extended boundary; but the area was extended for those purposes only, and not for all purposes. It could scarcely be contended, for example, that the effect of the Municipal Act of 1888 was to extend the jurisdiction of the High Court on its Original side over the new area, as being within the "Town of Calcutta." The Act itself draws a distinction between the "Town of Calcutta," "Calcutta," and the "suburbs" of the Town, and it would be a strong thing to hold that this Act, which was one to extend the "municipal limits of Calcutta," and to consolidate and amend the law relating to the municipal affairs of the town and suburbs of Calcutta, was an extension of the "Town of Calcutta," so as to exclude the newly enclosed area from the operation of the Tenancy Act. It may be noticed that the new boundaries are spoken of as those of "Calcutta," not of the "Town of Calcutta."

1899 JULY 12. — APPELLATE CIVIL. — 27 C. 202.

The land in dispute then is subject to the operation of the Bengal Tenancy Act.

Then comes the question whether the defendant is an occupancy raiyat, and that may be disposed of in a somewhat summary way. It appears that the plaintiffs are lessees of the Government, and this fact carries the present case outside the *dicta* of the Judicial Committee of the Privy Council in the case of *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnahs* (1).

But I fail to see how, on the facts of this case, the defendant can successfully urge that she is an occupancy raiyat. It is clear, on the findings of fact, both by the Subordinate Judge and the District Judge, and which are binding on us on second appeal, that the defendant was not occupying this land, but had let it out to sub-tenants. How then can she successfully say she is an occupancy raiyat within the meaning of the Tenancy Act?

[205] This appears to me to dispose of the case, and it becomes unnecessary to consider whether, if she were herself occupying the land, and were growing flowers and vegetables for the market, she could be said to be "cultivating" the land within the meaning of that Act.

On these grounds I think that the judgment of the Court below was right, and the appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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(1) 11 M.I.A. 345 (361, 362).

1899
AUG. 1.

APPELLATE CIVIL.

27 C. 205 = 4 C.W.N. 76.

27 C. 205 = 4 C.W.N. 76.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

UMRAO BIBI AND ANOTHER (*Defendants*) v. MAHOMED ROJABI (*Plaintiff*).* [1st August, 1899.]

Landlord and tenant—Suit for rent against a person holding land within a municipality and the land not proved to have been let out for agricultural or horticultural purposes —Bengal Tenancy Act (VIII of 1885), *s.* 5, *sub-s.* 1 ; *s.* 7. *sub-s.* 3 *and sch. III— Limitation Act (XV of* 1877), *sch. II, art.* 116*—Tenure-holder—Transfer of Property Act (IV of* 1882), *Chap. V, s.* 117.

The mere fact that a person has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent, is not sufficient to prove that he is a tenure-holder within the meaning of the Bengal Tenancy Act. It must be proved that the land was let out as a holding for agricultural or horticultural purposes.

In a suit for rent for a period of six years by an *ijaradar* upon the basis of a *kabuliat* alleged to have been executed by the predecessor of the defendant, it was contended for the first time before the appellate Court that the suit was barred by limitation, being one for rent for a period of more than three years. It was found that the land was not let out for agricultural or horticultural purposes.

Held, that inasmuch as the land was not let out for agricultural or horticultural purposes, the Bengal Tenancy Act did not apply, and therefore the suit was not barred by limitation.

Semble—When a question raised before the appellate Court is a mixed one of law and fact, and one which was not raised before the Court of first instance, it is doubtful whether the appellate Court should allow it to be raised.

[R., 17 C.L.J. 373 (380) = 19 Ind. Cas. 865 ; 5 Ind. Cas. 158 (160) ; 1 N.L.R. 1 (2) ; 20 Ind. Cas. 332 = 17 C.L.J. 411 ; D., 20 C.L.J. 1 (3).]

[206] THIS appeal arose out of an action for rent. The plaintiff, as an *ijaradar* of a certain plot of land situated within the Dacca Municipality, brought a suit for rent for the years 1297 B. S., to 1302 B. S., upon the basis of a *kabuliat* alleged to have been executed by the predecessor of the defendants.

The defence was that the *kabuliat* was not executed by the predecessor of the defendants, and that there was no relationship of landlord and tenant between the parties.

The Court of first instance, overruling the objections of the defendants, gave the plaintiff a decree.

On appeal to the lower appellate Court, a new plea was taken for the first time that the suit was barred by limitation, being one for rent for a period of more than three years. The Subordinate Judge deciding this point against the defendants, dismissed the appeal. The material portion of his judgment was as follows :—

"It is not a pure question of law, *i.e.*, of limitation, but a mixed question of law and fact. Besides, even if such a question can be entertained, where is the proper evidence to show that the case comes under the Bengal Tenancy Act. It is clear on the evidence that the lands lie within the Municipality of Dacca, and there is nothing to show that the lands were let out as holdings for agricultural or horticultural

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* Appeal from Appellate Decree No. 232 of 1898, against the decree of Babu Amrita Lal Pal, Subordinate Judge of Dacca, dated the 8th of November 1897, affirming the decree of Babu Nabin Chandra Nag, Munsif of that District, dated 14th of January 1897.

1899 AUG. 1. — APPELLATE CIVIL. — 27 C. 206 = 4 C.W.N. 76.

purposes. The mere fact, as appeared from the evidence, that one of the plots is a *sone sonda* (1) and portions of some other plots are cultivated with kitchen vegetables, is not sufficient. I overrule the plea of limitation."

Against thi sdecision the defendants appealed to the High Court.

Babu *Basunt Kumar Bose*, for the appellants.

Moulvie *Abdul Jawad*, for the respondent.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follow :—

JUDGMENTS.

MACLEAN, C. J.—I am doubtful whether the lower appellate Court ought to have allowed the point now argued before us to have been raised. It was never raised in the pleadings, and never raised in the Court of first instance. The case raised in the Court of first instance was that the defendants never executed the *ijara* in question: they fought that out and they [207] were beaten. It is not very easy to say whether this particular lease is or is not within the provisions of the Bengal Tenancy Act. It is found by the Court below that the lands lie within the municipal area of Dacca, but there is nothing to show that the land was let out as a holding for agricultural or horticultural purposes, though there appears to have been some evidence as to some of the plots being used for growing vegetables and *sone sonda*. I think we must take it, upon the findings, that this land was not used for agricultural or horticultural purposes, and, that being so, I see no reason to dissent from the view taken by the lower Court. The appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The two questions raised before us are, *first*, whether this suit, which was one for arrears of rent due under an *ijara* lease, which is a registered document, is governed by the three years' rule of limitation prescribed in the Bengal Tenancy Act, or the six years' rule of limitation under art. 116 of the second schedule of the Limitation Act; and, *second*, whether interest is recoverable at any rate exceeding 12 per cent. per annum, the rate prescribed by s. 57 of the Bengal Tenancy Act. These questions, as has been pointed out in the judgment of the learned Chief Justice, were not raised in the first Court; and it is very doubtful whether the lower appellate Court ought to have allowed them to be raised at all, because these questions are not pure questions of law, but are mixed questions of law and fact, their determination depending upon the question whether the Bengal Tenancy Act applies to this case—a question which again depends for determination upon the question whether the land, the subject of this lease, was used for agricultural and horticultural purposes, or for purposes other than those.

Upon the last-mentioned question the finding of the lower appellate Court is against the appellants. But the learned vakil for the defendants (appellants) contends that the question is a pure question of law, and that, having regard to the terms of the lease, the plaintiff was a tenure-holder within the meaning of s. 5 of the Bengal Tenancy Act, quite irrespective of the question whether the land was held for agricultural or horticultural purposes [208] or for any other purpose; and he bases his argument upon that part of the definition of the term tenure-holder in s. 5, sub-s. 1, of the Tenancy Act, which runs in these terms: "'Tenure-holder' means primarily a person who has acquired from a proprietor or from another

(1) A place where grass for thatching is grown.—ED.

1899 AUG. 1. — APPELLATE CIVIL. — 27 C. 205 = 4 C.W.N. 76.

tenure-holder a right to hold land for the purpose of collecting rents." It is argued that the lease shows that the plaintiff acquired from the proprietor or another tenure-holder a right to hold the land in question for the purpose of collecting rents from the occupants of the land, whether they are agricultural and horticultural tenants, or shop-keepers, or any other description of tenants.

I am of opinion that this contention is not sound. For, although the part of the definition of the term 'tenure-holder,' quoted above, may be comprehensive enough to lend some colour to the appellants' contention, yet we must take the provisions of the Act relating to tenure-holders as a whole, and see whether the term "tenure-holder," as contemplated by the Bengal Tenancy Act, would include a person such as the plaintiff has been found to be in this case. One of these provisions applicable to tenure-holders is that contained in s. 7 of the Act, and that section, especially cl. (*a*) of sub-s. 3 of it, to my mind, clearly indicates that a tenure-holder within the contemplation of the Act must be a person who holds land which is used for agricultural or horticultural purposes. For sub-s. 3 enacts that, "in determining what is fair and equitable, the Court shall not leave to the tenure-holder as profit less than ten per cent. of the balance which remains after deducting from the gross rents payable to him the expenses of collecting them, and shall have regard to (*a*) the circumstances under which the tenure was created—for instance, whether the land comprised in the tenure, or a great portion of it, was first brought under cultivation by the agency or at the expense of the tenure-holder or his predecessors in interest, whether any fine or premium was paid on the creation of the tenure, and whether the tenure was originally created at a specially low rent for the purpose of reclamation."

The view I take is in accordance with that taken in the case **[209]** of *Durga Sundari Dassi* v. *Umdatannissa* (1) decided under the former Rent Law, Act X of 1859. I may also add that this view receives considerable support from the provisions of s. 117 of the Transfer of Property Act. For we find in Chapter V of the Transfer of Property Act, in which s. 117 occurs, certain provisions of the law relating to leases of immoveable property, which obtain simultaneously with the provisions of the Bengal Tenancy Act, and the two enactments being different in many respects, it could not have been the intention of the Legislature that a case might, at the option of any party, be brought indifferently under the provisions of the one enactment or the other. The two enactments must have been intended to have separate application; and the line of demarcation between the two is, to a certain extent, indicated by s. 117 of the Transfer of Property Act, which enacts that none of the provisions of the chapter in which that section occurs applies to leases of immoveable property for agricultural purposes, except in certain cases. This indicates that the distinction between cases coming under the Transfer of Property Act, and those coming under the ordinary Rent Law, is constituted by the fact of the land being non-agricultural or agricultural.

For these reasons, and having regard to the finding that the land in dispute is not shown to be used for agricultural or horticultural purposes, I think that the lower appellate Court was quite right in holding that the Bengal Tenancy Act has no application to the present case.

S. C. G. *Appeal dismissed.*

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(1) 9 B.L.R. 101 = 18 W. R. 234.

27 C. 210.

1899 AUG. 15.

APPELLATE CIVIL.

27 C. 210.

[210] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.

HARENDRA LAL ROY CHOWDHRY (*Decree-holder*) *v.* SHAM LAL SEN (*Judgment-debtor*).* [15th August, 1899.]

Limitation Act (XV of 1877), sch. II, art. 179—Step in aid of execution—Application for execution of decree against some of the joint judgment-debtors, out of time—Realization of a portion of the decretal amount by such execution, effect of, as against other judgment-debtor who was not a party to the execution proceeding—Application in accordance with law.

A judgment-debtor, who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation, and that therefore it was not in accordance with law.

A decree was obtained against four persons on the 13th August 1890. An application for execution was made against all of them on the 7th October 1893. A subsequent application was made against two of them on the 17th February 1897, and a portion of the decretal amount was realized. On a further application for execution against the persons who were parties to the previous execution proceeding and also against a person who was not a party to the said proceeding, objection was taken by the latter that the application for execution as against him was barred by limitation.

Held, that the application was barred by limitation, inasmuch as the objector was not a party to the previous execution proceeding, which was itself barred by limitation and therefore it had not the effect of keeping the decree alive.

[D., 13 O.C. 48=5 Ind. Cas. 800.]

THIS appeal arose out of an application for execution of a mortgage decree. The decree was obtained against four persons on the 13th August 1890, and the order absolute was made on the 8th December of the same year. Applications for execution of the said decree were made from time to time. The third application for execution was presented on the 7th October 1893, and it was made against all the four judgment-debtors. On the 30th December following a notice was directed to be issued to one of them only. On the 24th February 1894, there was an order by the Court to the following effect; "Notice to the judgment-debtor to show cause why he should not be arrested if *talabana* be paid in three [211] days," but no *talabana* having been paid the execution case was struck off on the 17th March 1894. The next application for execution was filed on the 17th February 1897, only against two of the judgment-debtors Nos. 1 and 2, and a certain sum of money was realized from them. The present application was made on the 21st July 1898 against the judgment-debtors Nos. 1, 3 and 4, and a notice was issued to the objector judgment-debtor No. 4, to show cause why he should not be arrested in execution of the decree. His objection was that the execution had been barred when the application for execution was made on the 17th February 1897, and whatever steps were taken in that case by the decree-holder for the realization of the part of his due from the judgment-debtors Nos. 1 and 2 could not have the effect of enlarging the period of limitation.

The Court of first instance allowed this objection, and held that the application for execution as against the objector was barred by limitation.

From this decision the decree-holder appealed to the High Court.

* Appeal from Original Order No. 355 of 1898, against the order of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 17th of August 1898.

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Mr. *O'Kinealy*, Babu *Akshoy Coomar Banerjee*, and Babu *Bepin Behary Ghosh*, for the appellant.

Mr. *Jackson*, and Babu *Prosonno Gopal Roy*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.) :—

JUDGMENTS.

MACLEAN, C. J.—This is an appeal by the decree-holder from the decision of the Second Subordinate Judge of the 24-Parganas, holding that the decree-holder's application for execution, dated the 21st July 1898, was barred by limitation.

The point we have to decide is a short one, and it will only be necessary for me to deal briefly with a few dates and undisputed facts.

The suit was one to enforce a mortgage, and there were four defendants to that suit, of whom defendant No. 4 is the present respondent. A fina l decree was passed on the 8th of December 1890 for a sum of Rs. 18,000 or so. Applications for execution [212] were made from time to time, but it is sufficient for present purposes if we start from the application made on the 7th October 1893 against all the defendants.

In my opinion the decree which was passed was a joint decree against all the defendants.

On the 17th February 1897, which is more than three years after the date of the application of the 7th October 1893, a further application was made against the defendants Nos. 1 and 2 only, and that application resulted in a substantial sum being recovered by the decree-holder. Defendant No. 4 was not served with notice of, and was not, in anywise a party to, that application.

Then comes the present application of 21st of July 1898 against the defendants Nos. 1, 3 and 4, the latter of whom, as I said before, is the only respondent on this occasion.

These being the facts, two questions arise: *First*, whether the application of the 17th of February 1897 was out of time, and, *secondly*, if it were out of time, whether it is open to the defendant No. 4 to raise that objection on the present occasion.

I entertain no doubt that the application of the 17th of February 1897 was out of time. The last previous application was made on the 7th of October 1893, though an ingenious attempt was made to lead us to presume that having regard to the entry in the order sheet of the 24th February 1894, some application subsequent in point of date to that of October 7th, 1893, must have been made. I am not disposed to take that view. In my opinion the notice referred to in that entry was consequent only upon the application that had been previously made on the 7th October 1893. There is nothing to show that there was any such application as would meet the requirements of art. 179 of the second schedule to the Limitation Act after the 7th October 1893, and I am therefore clearly of opinion that the application which was made on the 17th of February 1897 was out of time.

But then it is contended that having regard to the case of *Mungul Pershad Dichit* v. *Grija Kanta Lahiri* (1) it is not open [213] to the present respondent to take that objection, and that as an order was made on the 17th February 1897 against the defendants Nos. 1 and 2, the defendant No. 4 is barred from saying that that application was out of time.

(1) 8 C. 51=8 I.A. 123.

I am unable to accept that view. To my mind the case in the Privy Council proceeds upon an entirely different footing. In that case, to put it shortly, the parties had been served with the application for execution, and an order on that application, adverse to them, had been made in their presence, by a Court of competent jurisdiction, and the Privy Council held that under these circumstances, although the execution of the decree might have been actually barred by time at the date of the application in question, yet if an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. But that case has no application to the present, where the defendant No. 4 was not a party to the application of the 17th of February 1897 nor a party to the order made upon that application. He knew nothing whatever about it, and it is difficult to see why, upon this, his first opportunity, he should be disentitled to show that that application was out of time.

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Great reliance is placed by the appellant upon the language of the explanation attached to art. 179 of the second schedule of the Limitation Act, which says that "where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them or against his or their representatives, shall take effect against them all." That means that the application may take effect against them all, if the application be such an application as is mentioned in the 4th clause of art. 179, that is to say, an application "made in accordance with law to the proper Court for execution or to take some step in aid of execution." But the application of the 17th February 1897 was not an application in accordance with law, because it was out of time, and that being so there is nothing, in my judgment, in the language of this explanation to show that a person who was not a party to the application, or to any order made upon it, is prevented from showing that the **[214]** previous application was out of time. The explanation does not say that any order made on such an application is to be binding on a person who was not a party to the application. The present respondent could not have taken any objection to the application of the 17th February 1897, or to the order made upon it, for he knew nothing about it.

I have now dealt with the only two points which have been raised: they both fail, and the appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The question for determination in this case is whether the present application, which was made on the 21st July 1898, for execution of the decree obtained by the appellant on the 13th August 1890, is barred by limitation. The Court below has answered that question in the affirmative, and hence the present appeal by the decree-holder. The contention of the learned counsel for the appellant is, that the view taken by the Court below is wrong, *first*, because the present application is made within three years from the date of the next preceding application, which was made on the 17th of February 1897, and behind which it is not competent for the parties to go; and, *secondly*, because even if it were competent to the judgment-debtor No. 4 to go behind the application of the 17th February 1897, that application was a good application as it was made within three years from the date of the previous application which must have been made on the 24th February 1894, as the order made by the Court on that day would show.

I shall consider these two contentions separately. It is quite true that an application for the execution of the decree of the 13th August 1890

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was made on the 17th February 1897, and that application was granted and some property of the judgment-debtors was attached upon that application. It is equally true that, according to the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(1) the judgment-debtors who are bound by the orders made upon the previous application are, in that state of facts, precluded from going behind that application, and from [215] contending that it was not in time and was not, therefore, a good application. But the only parties against whom the application of the 17th February 1897 can have this effect are the parties against whom that application, and the orders passed upon it, were made. It is clear, from the language of the judgment of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, that the ground of that decision is shortly this, that where once an application has been made, and granted, upon notice to the judgment-debtor, and proceedings are taken upon such application, it is not competent to such judgment-debtor to question the validity of the orders made, and the proceedings taken upon such previous application, on the ground that that application was barred by time. But that effect the application can have only against the parties against whom the application was made and upon whom notice of the application was issued. In the present case, the application relied upon was made, not against the judgment-debtor No. 4, who objects to the execution proceeding in the present instance, but only against the judgment-debtors Nos. 1 and 2. The case cited, therefore, cannot support the decree-holder's contention that the judgment-debtor No. 4, the respondent before us, is not entitled to go behind the application of the 17th February 1897, and to show that application was barred by limitation.

Then it is contended that, although the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) taken by itself may not have that effect, yet, taken along with expl. I of art. 179 of the second schedule of the Limitation Act, it ought to have that effect; as the application of the 17th February 1897 was an application made for the execution of a decree passed jointly against all the judgment-debtors.

Let us then examine the language of the explanation. It says that "where decree has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all." That means that an application for execution which is itself an application made according to law, that is, which is not itself time barred, though made [216] against some only of several persons against whom a decree is passed jointly, shall take effect against all of them. It does not say, however, that not only an application so made, but all orders made upon such application, shall have effect against the judgment-debtors other than those against whom the application was made. Now, it is necessary, for the success of the appellant's contention, that not only must the previous application have effect against all the judgment-debtors, but the orders made upon that application must also have a similar effect; for, otherwise, it could not be said that the judgment-debtor No. 4 was precluded from showing that the previous application relied upon was time barred. It is not the application itself, then, that would be sufficient for the appellant's purpose; but it must be the application taken with the order made thereon that can preclude a party from going behind the application and contending that it was time barred;

(1) 8 C. 51=8 I.A. 123.

and there is nothing in the explanation to the effect that, not only the application, by which must be understood an application according to law, that is, an application within time, but orders made upon an application which would preclude persons against whom they are made from going behind the application, shall have effect against judgment-debtors other than those against whom such orders were made. I do not, therefore, think that the contention urged on behalf of the appellant is correct. If the application, independently of the rule laid down in *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, was itself an application good in law, that is, made before the time for making it expired, then it would be sufficient, not only as against the person against whom it was made, but also against other judgment-debtors against whom the decree was jointly made.

This brings me to the consideration of the second contention urged on behalf of the appellant, namely, that the application of the 17th February 1897 was not barred by limitation, as it was made within three years from the date of a previous application which must have been made on the 24th February 1894. Now there is no application of the 24th February 1894 or of any other date in February 1894, forthcoming; and the only ground upon which the appellant's contention rests is this, that **[217]** the order sheet in the case shows that a notice on the judgment-debtor to show cause why he should not be arrested was ordered to be issued on the 24th February 1894 and as that order could have been made only upon an application for the issue of such a notice, we must presume that an application for the issue of such a notice, which would be an application to take som step in aid of execution, was made. I do not think that that inference at all follows; for the order of the 24th February 1894 might well have been made, and, in my opinion, was, in fact, made, not upon any fresh application made on that day, but upon the original application for execution made on the 7th October 1893, which contained a prayer that after service of notice on the judgment-debtors named in the column of names a warrant of arrest might be issued against them. That being so, the contentions urged before us both fail, and the appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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27 C. 217=4 C.W.N. 294.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

AMRITA LAL MUKERJEE (*Petitioner*) *v.* RAKHALI DASSI DEBI (*Opposite Party*).* [30th August, 1899.]

Civil Procedure Code (Act XIV of 1882), *ss.* 370, 102—*Insolvency Act* (11 *and* 12 *Vic.*, *C.* 21), *s.* 7—*Whether s.* 370 *of the Civil Procedure Code applies to a case, where there has not been a completed bankruptcy or insolvency—Dismissal of the suit for non-appearance of plaintiff or of the Official Assignee—Civil Procedure Code, ss.* 102, 103, 157, 371.

Section 370 of the Code of Civil Procedure does not apply to a case where there has been only an application to declare the plaintiff to a suit an insolvent and a vesting order made, but the proceedings are subsequently annulled, and the

* Appeal from Order No. 382 of 1898, against the order of Babu Radha Krishna Sen, Subordinate Judge of Hooghly, dated the 27th of August 1898.

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party is not declared either a bankrupt or an insolvent; therefore in such a case, where a suit has been dismissed for the non-appearance of the plaintiff or the Official Assignee on the date fixed for hearing, s. 103 of the Civil Procedure Code applies.

ONE Amrita Lall Mukerjee instituted a suit for an account in the Court of the Second Subordinate Judge of Hooghly, on the 16th [218] November 1897, and a Commissioner was appointed to take accounts, with a direction to submit his report on the 20th June following. On the 20th May, the defendant applied to the Subordinate Judge to add the Official Assignee as a party to the suit, inasmuch as the plaintiff had applied to the High Court to be adjudicated an insolvent, and his properties had been vested in the Official Assignee. Thereupon the Court granted a fortnight's time to the plaintiff to bring the Official Assignee on the record. The plaintiff again applied for further time to show to the Court that his application to be declared an insolvent had been withdrawn, and the case was postponed to 13th June 1898. On that day neither the plaintiff nor the Official Assignee appeared, and the Court, purporting to act under s. 370 of the Civil Procedure Code, dismissed the suit. The plaintiff then applied to set aside the order of dismissal on the ground that his application to be declared an insolvent was dismissed by the High Court. The Subordinate Judge rejected the petition, holding that the case came under s. 370 of the Civil Procedure Code, and the petitioner's remedy was by way of an appeal.

Against this decision the petitioner appealed to the High Court.

Babu *Boidya Nath Dutt*, for the appellant.

Babu *Golap Chunder Sarkar*, for the respondent.

The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was as follows :—

JUDGMENT.

MACLEAN, C. J.—This is a suit for an account. The taking of the account was referred to a Commissioner. Subsequently to that reference proceedings in bankruptcy were taken against the plaintiff, and a vesting order was made, vesting the property in the Official Assignee. Subsequently to that an application was made by the defendant on the 20th May 1898, that the Official Assignee should be made a party to the suit. That came on before the Court on the 13th June 1898. After one or two adjournments, neither the applicant nor the Official Assignee appeared, and the Court, purporting to act under s. 370 of the Code of Civil Procedure, dismissed the suit.

The first question is, whether the Court was right in holding that that section applied, and, secondly, whether it [219] was right in dismissing the suit as coming within the purview of that section. I think not. I think that s. 370 of the Code only applies to a case where there is an actual bankruptcy or insolvency. The language of the section, to my mind, clearly indicates that. It indicates that there must be a completed bankruptcy or insolvency, in which there is an Assignee or Receiver appointed. That does not apply to a case such as the present, where there has been an application to declare the plaintiff an insolvent and a vesting order made, but the proceedings are subsequently annulled and the plaintiff is not declared either a bankrupt or an insolvent. I think this is clear from the language of s. 370, coupled with the language of s. 7 of the Insolvency Act (11 and 12 Vic., c. 21), which says that if "after the making of any such vesting order, the petition of any such

petitioner shall be dismissed by the said Court, such vesting order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes." Here the petition was subsequently dismissed, and in my opinion s. 370 of the Code does not apply to such a case as that.

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But, then, was the suit properly dismissed for non-appearance on the part of the plaintiff. I think it was, nor has that been contested by the appellant. His contention is, that it must be treated as a dismissal, not under s. 370 of the Code, but as a dismissal under s. 102. If it be a dismissal under s. 102, then s. 103 would apply, and the appellant would be entitled to show that he was prevented by sufficient cause from appearing when the suit was called on for hearing. The learned Judge in the Court below has considered that the case does not fall within ss. 102 and 103 of the Code. He has, therefore, not gone into the question whether or not there was sufficient cause, and that is the main ground of the appeal in the present case. I think he was wrong in that view, that is in the view that this was a dismissal under s. 370. I think that under the circumstances it must be taken to have been a dismissal under s. 102, in which case I think s. 103 applies. There must be a remand in order that the Judge may go into the question of whether the plaintiff was prevented from appearing **[220]** when the suit was called on for sufficient cause. The costs of this appeal will abide the result.

BANERJEE, J.—I am of the same opinion. The question before us is, whether the present application for setting aside the order made by the Court below on the 13th of June 1898 dismissing the suit was entertainable under s. 103 of the Code of Civil Procedure. The Court below has answered that question in the negative, being of opinion that the order was made, not under s. 102 of the Code of Civil Procedure, to which alone s. 103 is applicable, but under s. 370 of the Code to which s. 103 has no application. As pointed out in the judgment of the learned Chief Justice the order of the 13th of June 1898 dismissing the suit for default of appearance could not have been made under s. 370 of the Code of Civil Procedure, when that section had no application to a case like this, in which no adjudication, declaring the plaintiff an insolvent, had been made.

That being so, the question now arises whether the order dismissing the suit can be treated as one made under s. 102 of the Code of Civil Procedure, and whether, even if it could be so treated, it is open to the appellant to treat it as such by his present application, or whether his remedy was not by way of appeal from that order or review of judgment.

The learned vakil for the respondent contends that, granting that the order could not have been made under s. 370 of the Code, under which it purports to have been made, still as it purports to have been made under that section, the only remedy for the present appellant was either by an appeal from that order, or by an application for review of judgment.

There might have been some force in that contention, if the non-applicability of s. 370 of the Code to the case could have prevented the order from being what it was, that is to say, if it could be said that because s. 370 of the Code was not applicable to the case, therefore the Court ought not to have dismissed the suit. But clearly that could not have been so. The plaintiff failed to appear on the day fixed for the hearing of the case, and the Official Assignee made no application to be allowed **[221]** to appear in place of the plaintiff, and the only course left open to the Court was to dismiss the suit for default of appearance. The order, therefore, that

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was made was the only order that could have been made under the circumstances. The only thing that is wrong in the order is, that a wrong section is relied upon in support of it. The proper section to which the Court ought to have referred was s. 157 of the Code of Civil Procedure, which would import s. 102 into the case. That being so, I do not think that there is any force in the contention urged on behalf of the respondent that the only remedy against the order of the 13th June 1898 was by way of an appeal or by an application for review. As that order was made and must be regarded as having been made under s. 102, the application for setting it aside under s. 103 of the Code was clearly entertainable.

S. C. G. *Appeal allowed; case remanded.*

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27 C. 221 (P.C.) = 26 I.A. 236 = 7 Sar. P.C.J. 628.

PRIVY COUNCIL.

PRESENT :

Lord Watson, Lord Hobhouse, Sir R. Couch and Sir Edward Fry.

[*On appeal from the High Court at Fort William in Bengal.*]

UDIT NARAIN SINGH AND OTHERS (*Plaintiffs*) *v.* GOLABCHAND SAHU AND OTHERS (*Defendants*). [6th, 7th and 21st July, 1899.]

Onus of proof—Accretion—Right of riparian proprietors—Title to alluvial land contested between villages on opposite banks—Possession—Prescription—Limitation.

The plaintiffs were the proprietors of a village on the southern bank, who disputed with those of a village on the northern bank the ownership of alluvial land formed by the Ganges. The current, after having encroached upon the southern bank, went away from that side of the river towards the northern, leaving the tract of alluvial land now in dispute. This appeared on its previous site to the south of the main stream. It was then carried away by diluvion, and again appeared after that. This land was claimed by the plaintiffs, not as part of their old land, but on the strength of their having held possession, adversely and without interruption, for more than twelve years before their dispossession by the defendants, by whom they alleged themselves to have been ousted within less than twelve years before they brought this suit.

[222] The evidence did not support their claim, the burden of proof being on them. It was shown that after the second recession of the river towards the north, and after the re-appearance of the alluvial land on the south of the current, the land had been taken by the Government into their possession, and that the latter had made over the greater part of it to the defendants who had since held this part. There had not been shown to have been any actual possession held of the remainder by the plaintiffs, who had thus failed as to the whole to prove the continued possession necessary to their acquiring title.

[R., 8 A.L.J. 247 = 10 Ind. Cas. 742 (744); 3 C.L.J. 316 (331); 6 C.L.J. 735 (744) = 12 C.W.N. 127.]

APPEAL from a decree (30th March 1896) of the High Court, reversing a decree (28th June, 1893) of the Subordinate Judge of Patna.

The plaintiffs, appellants, maliks of the village Chitnawan on the southern bank of the Ganges, brought this suit on the 20th June 1892 for the proprietary possession of alluvial land formed in the river. They alleged that they had been dispossessed forcibly in 1889 by the defendants, the maliks of mauza Ganghara on the northern bank, after having held possession since the 26th September 1869, and relied on having acquired title by possession, continuous and adverse, until they had been ousted, their ouster having taken place within twelve years of the date of their suit.

The defences were that (1) the plaintiffs had not held the land in their possession for twelve years, but that, on the contrary, the tract of

land was within the boundary of the defendants' revenue-paying mehal; and (2), that the suit was barred by limitation. 1899 JULY 21.

These riparian owners contested their right to some hundreds of bighas of land which had been formed by the action of the river. In the course of years alternate appearance and disappearance of this alluvial deposit had taken place, consequent upon changes in the course of the main stream. These changes and their effect on the site are stated in their Lordships' judgment. PRIVY COUNCIL.

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The questions on this appeal were mainly, (1) whether the plaintiffs had proved an uninterrupted possession of the tract for twelve years, thus acquiring title by prescription; (2) whether they had sued within time after ouster by the defendants.

The Subordinate Judge gave the plaintiffs a decree for the greater part of their claim. In his judgment they were entitled to add to their period of possession a prior period during which [223] the land had been occupied by another opponent, *viz.*, the neighbouring village Magarpal, against whom the plaintiffs had obtained a decree in 1869. They had then held till 1879 without interruption; and assuming an ouster to have taken place by the defendants, as the latter alleged, in 1881, they, the plaintiffs, had been in possession for fifteen years ending within twelve years of their filing this suit.

The High Court (TREVELYAN and BEVERLEY, JJ.) on appeal found no sufficient proof by the plaintiffs of their continuous possession for twelve years before their ouster by the defendants. There was a break in the plaintiffs' possession. After the tract of land had been submerged, it again appeared, on the departure of the river's current in the northward direction, on the former site on the south side. Then it apparently had been claimed by the plaintiffs. But this later claim, not shown to have been followed by their obtaining possession, could not be held sufficient. The possession, which dated from 1869, had been interrupted by the diluvion of the disputed land which took place on or about 1874. Again in 1879 the tract had re-appeared on another change in the current towards the north. The Court did not find that there had been on the evidence any effective possession after the land had reached the surface in that year. On the contrary, the evidence showed that the Government having taken possession of the land as diara had made the greater part of it over to the defendants. Even if the possession by the village Magarpal were to be tacked on to the possession of the plaintiffs, continuous possession would not appear to be made out for the period of twelve years. There had been no proof of possession by the plaintiffs in 1881, and no title had been created before the diluvion of 1874. The decree of the Court of first instance was reversed.

On this appeal by the plaintiffs,—

Mr. *J. H. A. Branson*, for the appellants, contended that the right inference had not been drawn from some of the evidence, which, had it received due weight, would have led the High Court to a conclusion in their favour. It should have been found that continued possession was held by the plaintiffs' village for twelve years before they were ousted by the defendants. If the date of [224] that ouster was taken to be no later than 1881, the plaintiffs would still have shown a twelve years' continuous possession, from 1869 to a date in 1881, which was sufficient to entitle them to claim that their possession had been matured by time into a right of property. And also it had been shown that the

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date of their dispossession was within the twelve years before the date of their filing the suit in June 1892. The facts on which he relied were, mainly, that beginning with the first re-appearance of the alluvial land now claimed on its former site, the plaintiffs had obtained possession after their litigation with the Magarpal village in September 1869. The tract again disappeared in or about 1874-75, being washed away by the returning stream; but during submergence the original site remained the property of the plaintiffs, and there was no change of the right on their part to take possession as soon as the river receded, and the land was again above the surface of the water. The plaintiffs were not deprived of possession by the defendants at that time, and there was no ouster in the legal sense. The alluvial land was again above the level of the river in 1879, on the same side. The plaintiffs again had possession, and the evidence went to establish that they were not ousted by the defendants till 1881 at the earliest. Thus their claim to be entitled by adverse and continuous possession for twelve years was made good.

He referred to *Radha Gobind Roy* v. *Inglis* (1); *Rains* v. *Buxton* (2), *Rajkumar Roy* v. *Gobind Chandra Roy* (3); and *Lee* v. *Johnston* (4). He then referred to s. 4, Regulation XI of 1825, and to decisions of the Court of Sudder Dewani, giving to that section a wider scope than it should have received on the subject of alluvial accretion to land in rivers previously to 1870. In that year the construction had been corrected by the judgment of the Judicial Committee in *Lopez* v. *Muddon Thakur* (5). But according to the view entertained till about that time, and prevailing in the earlier days of the present case, of alluvion and diluvion, the rule was that, where a river being the boundary between two estates [225] encroached on one bank and receded from the other, the river remained the boundary, and any alluvial accretion to the estate from which the river receded belonged of right thereto. Thus the plaintiffs would, as a matter of course, have followed the receding river taking possession of all the alluvial deposit left by it as far as it receded. The evidence for the plaintiffs was supported by the probability of the case as to their having obtained possession before the diluvion of 1874-75 to the furthest point of the river's recession from their bank. During that diluvion and its effects, till 1879, when the land again appeared, the river having returned to a course northward, the site remained the plaintiffs'. The decision in *Lopez* v. *Muddon Thakur* (5), was that when land had been washed away, and the site had remained capable of being identified, the land newly appearing on that site belonged to the estate which had all through the change comprised that site. Hence the right of the plaintiffs to take possession in 1879 was again in support of their having done so, and of their having remained undisturbed by the defendants till 1881. By this last date their title by non-claim had been acquired, and their ouster, if it had taken place as early as that year, was within twelve years of June 1892, when this suit was filed. He referred to *Rao Karan Singh* v. *Bakar Ali Khan* (6), to s. 29 of Act IX of 1871 and s. 28 of Act XV of 1877, and to arts. 142 and 144 of the latter Act. Also to *Rajrup Koer* v. *Abdul Hossein* (7); *Kally Churn Sahoo* v. *The Secretary of State for India* (8); and *Manomohun Ghose* v. *Mathura Mohun Roy* (9).

(1) 7 C.L.R. 364 = 3 Suth. P.C. 809.
(2) (1880) L.R. 14 Ch. D. 537.
(3) 19 C. 660 = 19 I. A. 146.
(4) (1869) L R. 1 App. Ca. H.L. 426 (433).
(5) 13 M. I. A. 467 = 5 B. L. R. 521.
(6) 5 A. 1 = 9 I.A. 99.
(7) 6 C. 394 (402) = 7 I.A. 240.
(8) 6 C. 725 (734).
(9) 7 C. 225 (234).

Mr. *C. W. Arathoon*, for the respondents, argued that the evidence had not established that the appellants had possession of the land within the twelve years preceding the suit. And against the facts alleged as the foundation of the plaintiffs' title, their having had possession continued and adverse for more than twelve years before their ouster by the defendants, there were the concurrent findings of two Courts that the Government had **[226]** taken possession of the disputed land as diara on its appearance above water in 1879, and that the greater part of the land had then been made over by the authorities to the defendants. As to the remainder of the alluvial land, there had been no clear evidence of the plaintiffs having obtained possession of any of it. The suit had therefore been rightly dismissed by the High Court.

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Mr. *J. H. A. Branson* replied.

JUDGMENT.

Afterwards, on the 21st July, the judgment of their Lordships was delivered by

SIR EDWARD FRY.—The plaintiffs and present appellants are maliks of the village of Chitnawan, and the defendants and present respondents are maliks of the village of Ganghara.

In 1843 the two villages were separated by the river Ganges, Ganghara lying on the northern, and Chitnawan on the southern, shore of the river.

The lands in question were formerly made over to the maliks of Ganghara, and the plaintiffs do not claim them as part of their old lands; but the propositions on which they rely are these: *first*, that for a period of twelve years they were in possession of the land and thereby acquired title; and, *secondly*, that they brought this action within twelve years of their dispossession by the defendants. The burthen of proving both these propositions rests on the plaintiffs.

In 1859 the Ganges receded northwards, and all that remained of it in its ancient site was a dead stream or stagnant pool known as the Dhab; and between that and the new bed of the Ganges to the north there was formed a diara or mass of alluvial deposit which seems to have emerged from the face of the waters about the year 1860. This diara included the lands now in controversy. When the land emerged it was taken possession of by the maliks of Magarpal, a village to the north-west of Chitnawan. The maliks of Chitnawan thereupon sued those of Magarpal for possession of the land in controversy, apparently founding their claim on the custom of *dhar-dhura*, *i.e.*, a supposed right of a riparian owner to follow the receding bank of the river and to claim all land between the old and the new shore. In this claim the maliks of Chitnawan were successful, and on the 15th June 1869 the High **[227]** Court affirmed a decree of the inferior Court, whereby they were held entitled to recover 597 bighas of land; and on the 26th September 1869 possession was duly delivered to the plaintiffs' predecessors in title, not only of the decreed lands, but of other land which had during the pendency of the litigation been added to them by the further retreat northward of the river's course. The lands then delivered to the maliks of Chitnawan include the lands now in controversy; and the plaintiffs start with their possession on this 26th September 1869 as the terminus from which they seek to make out their title by possession.

In or about 1874 the course of the river again moved, and this time southwards, and again submerged the lands in question; but they

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appeared above the waters in or about 1879, and at this point arises the most material issue of fact.

The plaintiffs allege that their possession before the submergence of the lands continued during that submergence; that when the land re-appeared they continued to possess it down to 1889, when they were forcibly dispossessed by the defendants; and that they, the plaintiffs, brought the present action in June 1892, from whence they conclude that they had in the year 1881, *i. e.*, twelve years from 1869, acquired a title by possession, and that they brought their action within less than twelve years from their dispossession in 1889.

The defendants, on the other hand, allege that on the emergence of the land in 1879 Government took possession of it; that on 23rd September 1879 a suit was brought by the maliks of Ganghara against the Government claiming these lands as part of their village; that a compromise was come to and embodied in a decree of the 25th March 1881; and that, in pursuance of that decree, the defendants were on the 15th of January 1881 put into possession of the larger and northern part of the lands now in question, and that, as to the southern portion of the lands, it remained the subject of actual and sometimes of physical controversy between the two villages, and that the plaintiffs have not shown any possession of it upon which they can rely.

These views are substantially accepted by the High Court, who, in reversal of the decree of the Subordinate Judge, dismissed the suit.

[228] Their Lordships, on a consideration of the evidence before them, are of opinion that the plaintiffs have not sustained their case; their Lordships think that the well-known practice of the Government to take possession of land re-appearing in river beds makes the evidence of the defendants as to what took place in 1879 far more probable than the suggestion of the plaintiffs that they entered into actual possession of the land when it re-appeared, and they believe that in fact the Government did enter into possession in 1879; furthermore, their Lordships conclude that in 1881, and probably before the 26th September of that year, the whole of the controverted land to the north of the green line on the Amin's map made in this action and marked D was delivered into the possession of the maliks of Ganghara; and they are further of opinion that, as to the land in question to the south of the green line, the evidence shows not so much that the plaintiffs were in possession as that they claimed so to be. The report of the Special Deputy Collector of the 25th July 1888 shows in what an ambiguous position this southern portion of the land continued to be down to the year 1888.

In coming to the conclusions above stated, their Lordships have treated the maps G and H as evidence in the case. Both these maps were used in the Courts below; and though objected to in the Court of first instance, it does not appear that they were objected to in the High Court, and in the appellant's case their acceptance in evidence is not mentioned as a reason for the appeal. If the objection to the admission of these maps had been successfully urged in India, other evidence might have been forthcoming to give the required information; and their Lordships cannot now give effect to these objections.

Their Lordships, for the reasons above stated, are of opinion that the appellants have failed to prove a continuous possession for twelve years to give them title, and they will therefore humbly advise Her Majesty to

confirm the judgment of the High Court and to dismiss this appeal. The appellants will pay the costs.

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Appeal dismissed.

Solicitors for the appellants : Messrs. *T. L. Wilson & Co.*
Solicitors for the respondents : Messrs. *Dallemore & Son.*

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27 C. 229=4 C.W.N. 327.

[229] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

SHEO NATH SARAN (*Defendant*) v. SUKH LAL SINGH AND OTHERS (*Plaintiffs*).* [13th June, 1899.]

Oaths Act (*X of* 1873), *s.* 9—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 462—*Offer by guardian of minor defendant to be bound by oath of plaintiff.*

The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on oath taken in a particular form under the Indian Oaths Act, stands on a very different ground from an agreement or compromise contemplated by s. 462 of the Civil Procedure Code. In such a case, the minor is bound by the consent of his guardian, although given without the leave of the Court, provided that there is no fraud or gross negligence on the part of the guardian.

Chengal Reddi v. *Venkata Reddi* (1) approved of.

[F., 28 A. 35=2 A.L.J. 493=25 A.W.N. 171 ; R., 37 C. 897=6 Ind. Cas. 813 ; 15 Ind. Cas. 161=95 P.R. 1912=159 P.W.R. 1912 ; D., 24 M. 326 (330) ; 75 P.R. 1900.]

THE plaintiffs, Sukh Lal Singh and others, were owners of a share of *mauzah* Dharamwali, valued at Rs. 3,300. The defendant No. 1, Ram Kishun Pershad, and Ganga Bishun Pershad, father of the defendant No. 2, were the owners of a share of *mouzah* Rampur Serai, valued at Rs. 2,000. By registered deeds of exchange (*mobadala*), dated 11th January 1891, the parties mutually transferred the ownership of the properties, with the further stipulation that the defendant No. 1 and the father of defendant No. 2, would pay to the plaintiffs Rs. 1,300, the difference of the values of the properties, with interest. The present suit was instituted to recover from the defendants the said sum with interest. The main defence was that the defendant No. 1 had paid to the plaintiffs on different dates Rs. 1,035 out of Rs. 1,300.

After the defendant No. 1 had been examined, the defendants filed an application making what is called *hassar* on the testimony of the plaintiff No. 3, *i. e.*, agreeing that, if the said plaintiff should [230] swear in accordance with a particular kind of oath that he had or had not received the money said to have been paid, the defendants would abide by the result. The application was made by the defendant No. 1 on his own behalf and as guardian of the defendant No. 2, who was a minor. The plaintiff No. 3 accordingly took that form of oath and swore that he had not received the money ; and the first Court decreed the suit.

On appeal by the minor defendant, it was contended before the District Judge that, under s. 462 of the Civil Procedure Code, the guardian

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* Appeal from Appellate Decree No. 2237 of 1897, against the decree of G.W. Place, Esq., District Judge of Sarun, dated the 19th of August 1897, affirming the decree of Babu Dwarkanath Bhuttacharji, Subordinate Judge of that District, dated the 11th of November 1895.

(1) 12 M. 483.

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was not competent to bind the ward in regard to the particular form of oath aforesaid, without the permission of the Court. The plea was overruled and the appeal was dismissed.

The minor defendant then appealed to the High Court.

Babu *Jnanendra Nath Bose* (for Dr. *Ashutosh Mukerjee*), for the appellant.

Babu *Jadu Nath Kanji Lal*, for the respondents.

The judgment of the High Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit upon a bond executed by the defendant No. 1 and the father of the minor defendant No. 2. The defence was simply one of payment. The guardian of the minor defendant No. 2, having regard to the provisions of s. 9 of the Indian Oaths Act of 1873, stated that, if the plaintiff should swear in accordance with a particular form of oath whether he had or had not received the money said to have been paid, he would abide by the result. Accordingly, the plaintiff did take the form of oath required, and deposed that no payment had been made and that the whole of the money wae due to him. The Court of first instance, thereupon, gave a decree to the plaintiff, and that decree has been affirmed in appeal by the District Judge.

The only point raised before us in this second appeal is that, under s. 462 of the Code of Civil Procedure, it was not open to the guardian of the minor defendant, without the leave of the Court, to enter into the agreement that he did enter into, in respect to the decision of the Court depending upon the evidence to be given by the plaintiff. We think, however, that the matter does not really come within the scope of s. 462. **[231]** There was no agreement or compromise properly so called that was entered into by the guardian of the minor defendant. What he did was simply this: The burden of proof of payment being upon him, he cited the plaintiff as a witness, and stated that if the plaintiff would take a particular form of oath and depose that the whole of the money was actually due to him and was not paid by the defendants, he would abide by the result. That, we think, stands on a very different ground from an agreement or compromise contemplated by s. 462. We observe that in the case of *Chengal Reddi* v. *Venkata Reddi* (1) the Madras High Court has held that in circumstances like these the minor defendant is bound by the consent of his guardian, if there is no fraud or gross negligence on the part of the latter, and although the Court did not sanction the agreement under s. 462 of the Code of Civil Procedure. We think that this is a correct exposition of the law; and taking the same view as the Madras High Court did, we dismiss this appeal with costs.

M. N. R. *Appeal dismissed.*

(1) 12 M. 483.

27 C. 231=4 C.W.N. 289.

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APPELLATE CIVIL.

27 C. 231=4 C.W.N. 289.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

BANKA BEHARY DASS (*Plaintiff*) v. RAJ KUMAR DASS (*Defendant*).*
[30th May, 1899.]

Benami *transaction—Suit by real owner against* benamdar—*Colorable transaction in fraud of creditors—Fraudulent purpose given effect to by claim successfully preferred by the benamdar.*

A suit does not lie for a declaration that a conveyance executed by the plaintiff is a *benami* and fictitious transaction, when the alleged transaction has been used to *accomplish* the fraudulent purpose for which it was intended. The fraudulent purpose is *accomplished* when the property conveyed being attached by a decree-holder, the *benamdar* is allowed to prefer a claim to it, and the claim is allowed by the Court.

[R., 28 C. 370 (380); 33 C. 967=4 C.L.J. 22=10 C.W.N. 650; 8 C.W.N. 620 (621).]

THE plaintiff, Banka Behary Dass, instituted a suit in the Court of the Subordinate Judge of Sylhet for a declaration that a deed of sale, dated the 5th Assar 1296 B. S., of certain immoveable properties, executed by the plaintiff's father in favour of [232] the defendant, Raj Kumar Dass, was a *benami* and fictitious deed. It was alleged in the plaint that the plaintiff's father was largely involved in debt, and one of his creditors began to make attempts to bring to sale the whole of his property. Thereupon, on a representation made to him by the defendant, who was an intimate relation, he was induced to execute the aforesaid *benami* deed of sale for a nominal consideration of Rs. 2,000, which was never paid. The present suit was instituted, because, after the death of the plaintiff's father, the defendant, in July 1893, attempted to set up a claim to some of the properties covered by the deed of sale by applying for mutation of names.

The defendant contended that the plaintiff was estopped by his own act and conduct, and that the *kobala* was a real transaction. He further stated that after the conveyance, two of the creditors of the plaintiff's father, Loke Nath Sarma and Raman Behary Sarma, attached some of the properties conveyed, to which he (the defendant) preferred a claim, and the properties were released from attachment on the 18th September 1890.

The Subordinate Judge, after a remand by the High Court as to the question of the proper court-fee payable, held, following the case of *Goberdhan Singh* v. *Ritu Roy* (1), that the plaintiff was precluded from maintaining the suit, as "the fraud, as set out in the plaint upon which the plaintiff asked the Court to grant him relief, was not only attempted, but actually carried into effect."

The suit was accordingly dismissed.

The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose*, and Babu *Jay Gobindo Shome*, for the appellant.

Babu *Tara Kishore Chowdhry*, for the respondent.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows:—

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* Appeal from Original Decree No. 322 of 1897, against the decree of Babu Joy Gopal Sinha, Subordinate Judge of Sylhet, dated the 30th of June 1897.

(1) 23 C. 962.

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JUDGMENT.

The object of this suit is to obtain a declaration that the *kobala* of the 5th Assar 1296, executed by the appellant's father in favour of the respondent, is a *benami* and fictitious deed not affecting the appellant's right to the property which it purported to [233] convey, and to get such further relief as the Court may think fit to give in confirmation of the appellant's title and possession. The plaint discloses that the deed in question was executed at the respondent's suggestion to secure the property against persons who had obtained decrees against the appellant's father, that it was a purely colourable transaction without consideration or any transfer of possession, and that the respondent was now fraudulently setting up a title to the property. The respondent put in a written statement, in which he claimed title to the property under the *kobala* impugned by the appellant, alleging that there was a good and valid sale for consideration. Admittedly the deed in question was used to give effect to the fraudulent purpose for which, according to the appellant's case, it was executed. The holder of a decree against the appellant's father attached the property; the respondent was allowed to put forward a claim to it on the strength of this deed; and the claim was allowed by the Court. On the allegations in the plaint, coupled with the undisputed facts mentioned, the Subordinate Judge, without taking any evidence, dismissed the suit on the ground that the plaintiff could not maintain it.

In our opinion the decision is right and the appellant cannot ask the Court to relieve him from the consequence of an accomplished fraud. He cannot be allowed to show the true nature of the conveyance which gave a good legal title to the respondent, when the conveyance has been successfully used to give effect to the fraudulent purpose for which it was executed. In none of the cases decided in England and in this country, which have been cited in the argument, except perhaps the case of *Param Singh* v. *Lalji Mal* (1), does it appear that relief has been given in a case such as this; and in the recent cases of *Goberdhan Singh* v. *Ritu Roy* (2) and of *Kali Charan Pal* v. *Rasik Lal Pal* (3), where there was a colourable conveyance in fraud of creditors, and the fraud had been carried into effect, this Court refused to give the plaintiff relief. The same course was adopted by the Madras Court in *Rangammal* v. *Venkatachari* (4) and in *Chenvirappa* v. [234] *Puttappa* (5), West and Birdwood, JJ,, dissented from the Allahabad case mentioned above.

It is argued that there is no real distinction between cases in which there is a fraudulent conveyance to cheat creditors, but nothing more is done in furtherance of the fraud, and cases in which the fraudulent purpose is effected wholly or partially by means of the fraudulent conveyance; and we have been referred to a number of cases in which it is said that the stricter and broader rule adopted in the earlier cases in this Court, (*e. g*., in *Alooksoondery Goopto* v. *Horo Lal Roy* (6) and in *Kalee Nath Kur* v. *Doyl Kristo Deb* (7),) has been relaxed and relief given without any such distinction being drawn. The cases referred to are *Luteefoonissa* v. *Goor Surun Doss* (8), *Sree Nath Roy* v. *Bindoo Bashinee Debia* (9), *Debia Chowdhrain* v. *Bimola Soonduree Debia* (10), *Gopee Nath Naik* v. *Jodoo*

(1) 1 A. 403. (2) 23 C. 962. (3) 23 C. 962 note.
(4) 18 M. 378. (5) 11 B. 708. (6) 6 W. R. 287.
(7) 13 W. R. 87. (8) 18 W. R. 485 (494). (9) 20 W. R. 112.
(10) 21 W. R. 422.

Ghose(1), *Bykunt Nath Sen* v. *Goboollah Sikdar* (2), and *Thacoor Prosad* v. *Baluck Ram* (3).

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All these cases purport to follow the decisions of the Judicial Committee in *Ram Surun Singh* v. *Pran Pearee* (4) and *Oodoy Koowur* v. *Ladoo* (5). In the former case the plaintiff sued for possession on a conditional deed of sale executed by the defendant, who pleaded that the deed had been merely nominally executed without any consideration to protect the property against persons claiming it as heirs of her husband. In a previous suit brought by those persons for the property and charging that the conveyance was made to deprive them of their rights, the plaintiff and defendant both asserted that the deed was a good deed for consideration. The suit was dismissed on the sole ground that [235] there was no right of suit in the widow's lifetime. It was contended that the respondent was estopped by her pleadings and admissions in that suit, and could not deny or contest the validity and legal effect and operation of her deed, or set up her own fraud to prevent the operation of it. Their Lordships held that the deed created no estoppel, that it was a case of a common mortgage in which it was open to the mortgagor to deny the receipt of the money and to cut it down to a nominal sum or nothing, and that that being so, and the instrument being relied on by a person out of possession seeking to recover possession through the medium of a foreclosure suit, there was nothing to prevent the defendant from showing the real truth of the transaction. As regards the estoppel by pleading, they said that a pleading by two defendants against the suit of another plaintiff could not amount to an estoppel as between them.

In the latter case, the plaintiff claimed the property as heir of her deceased son Shib Lall, and denied that the latter had been given in adoption to the defendant, who was the widow of Shib Lall's brother. In a previous suit brought by the respondent for herself and as guardian of Shib Lall to redeem a property mortgaged by the plaintiff's husband, it was objected that she was not the guardian of Shib Lall and could not maintain the suit. The plaintiff intervened in that case and put in a petition supporting the adoption and disclaiming any interest in the property. Their Lordships said that if the petition was to prevent the plaintiff from recovering the property, it would only do so either because it operated as a conveyance or a contract to convey, or by way of estoppel; that it could not operate as a conveyance or contract, because the plaintiff had at that time no interest in the property, and never contemplated a conveyance of the right which she now had; that it did not operate as an estoppel, because the fact that the plaintiff professed to resign some supposed interest as heir of her husband could not estop her from setting up her real right as heir of her son when that right accrued; and they added that there was no consideration, and no misrepresentation to the defendant, who knew the actual facts and did not alter her position in any way.

These were not therefore cases of a fraudulent conveyance [236] by a deed of absolute sale, to which effect had been given in aid of the intended fraud, and they furnish, we think, no authority for the broad contention now put forward. It is unnecessary to allude in detail to the cases cited from the Weekly Reporter; the facts are not fully stated,

(1) 23 W.R. 42. (2) 24 W.R. 391. (3) 12 C. L. R. 64.
(4) 13 M.I.A. 551. (5) 13 M.I.A. 585=6 B.L.R. 283.

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and in none of them do the facts appear to be similar to the facts of this case. In *Luteefoonissa* v. *Goor Surun Dass* it was held, citing the case of *Ram Surun Singh* v. *Pran Pearee* (1), that a party against whom the admission of a deed of gift is sought to be used may explain the matter and show the real nature of the transaction. In *Sreenath Roy* v. *Bindoo Bashinee Debia* the question was whether a jote had a real existence or was, as the defendant contended, only colourably created. It was held that the defendant was not stopped by a statement of the person from whom he derived title by purchase from showing that the jote was only colourably created, and the two cases in the 13th volume of Moore were cited as an authority. In *Debia Chowdhrain* v. *Bimola Soonduree Debia* the defence in substance was that the persons from whom the plaintiff derived title by purchase were really the *benamdars* of the defendant, who was the real owner. It was held again, citing the cases in the 13th volume of Moore, that the defendant was not estopped from showing the true nature of the transaction by some admission which she had made in a previous suit. In *Gopeenath Naik* v. *Jodoo Ghose* the facts are not at all stated, but Markby and Mitter, JJ., said they adopted the view of the law taken in *Debia Chowdhrain* v. *Bimola Soonduree Debia*. In *Bykunt Nath Sen* v. *Goboollah Sikdar* there is also no report of the facts, but Markby, J., said that he dissented from the Judge's statement that "it is a settled principle that when a father makes a fictitious sale to cheat his creditors, neither he nor his heirs can afterwards impugn its validity;" and he added that this principle was inconsistent with the decisions in the 13th volume of Moore and in the 21st volume of the Weekly Reporter. In none of those cases does it appear that the plaintiff was asking for relief against his own fraudulent conveyance which had been successfully used to defraud a creditor. It is true that in *Sreenath Roy* v. *Bindoo Bashinee* [237] *Debia* and in *Debia Chowdhrain* v. *Bimola Soonduree Debia*, Sir Richard Couch made some remarks of a general character, which must, however, be taken in connection with the facts of the particular case before him. In the former case he said that the questions "to what extent a person shall be at liberty to allege and prove fraud in a matter to which he was a party, or shall be at liberty to allege and prove that any admissions made by him were made with a fraudulent purpose and were not true, and also to what extent persons claiming under any one who had made such admissions will be at liberty to do the same," had been much discussed in the Courts in England. Then he said that in this respect there was no difference betweeen the law in England and the law in India, and for the law in England he cited *Symes* v. *Hughes* (2), and said that the law in India had been settled in the case reported in the 13th volume of Moore, page 551. In *Symes* v. *Hughes*, which Sir Richard Couch cited in both the cases referred to, Lord Romilly, M. R., said: "Where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object, when the assignment was executed, does not deprive the assignor of his right to recover the property from the assignee, who has given no consideration for it;" and he added that in that case no harm had been done to any creditor, and that the suit was now being prosecuted to enable the creditor to recover something. We cannot suppose that Sir Richard Couch would have cited this case as stating the law in England without recognising the distinction referred to in it.

(1) 13 M. I. A. 551.

(2) (1870) L.R. 9 Eq. 475.

The case which at first sight seems most in the appellant's favour is that of *Thacoor Prosad* v. *Baluck Ram* (1). There Thacoor Prosad, who was a member of a family to which apparently the Mitakshara rules applied, claimed as exclusively his a property which had been acquired in his name. The defendants were the purchasers of the rights and interests of the other members of the family. Thacoor Prosad had mortgaged the property, and to defeat the claims of the mortgagee he and the other members of the family set up in execution proceedings a partition deed by which no part of the property in question [238] had been allotted to Thacoor Prosad. It was found that the partition deed was not a real transaction, and that the property had been acquired in Thacoor Prosad's name for all the members of the family. Mitter and Maclean, JJ., held, citing the case in the 13th volume of Moore, page 551, that Thacoor Prosad was entitled to show the real character of the partition deed in the suit between himself and the purchasers of the rights of the persons whose fathers had joined with him in setting it up. The defendants had not, however, acquired the interests of Thacoor Prosad, the latter had not parted with his interest, and it was found that although not entitled to the whole property, he was entitled to his share as a member of the family.

The English cases cited do not help the appellant. In *Bowes* v. *Foster* (2), there was a pretended sale, but the plaintiff had not parted with the title to the goods and nothing further was done in furtherance of the intended fraud. So also in *Taylor* v. *Bowers* (3), the title to the goods was still in the plaintiff, and, as Lord Justice James said, he was not obliged to state a fraud of his own as part of his title. Nothing moreover had been done to carry out the fraudulent or illegal obeject beyond the delivery of the goods.

The argument that in the case of a fraudulent conveyance there is no distinction between the cases in which the fraudulent object has been carried into execution and the cases in which it has not, might, if sound, be a good ground for, holding that the Court would not give relief in either case, but not for holding that it would give relief promiscuously in both. It is said that by refusing relief the Court is aiding the defendant to commit a fraud; but this is a lesser evil than giving the plaintiff relief against a fraud which he had successfully perpetrated. He is asking the Court to undo what he did for a fraudulent purpose by means of a fraudulent conveyance which was used to accomplish that purpose, and the authorities, we think, show that the Court will not give him any relief.

It is said that the money due under the decree referred to at [239] the commencement of this judgment was afterwards paid, that the creditor received Rs. 5,000 in satisfaction of his claim for Rs. 8,000 and gave a receipt in full, and that the plaintiff ought to have been allowed to give evidence in support of his case. We think this makes no difference, and if the plaintiff would not succeed on the facts as stated, it was not necessary to go into evidence. The appeal is dismissed with costs.

M. N. R. *Appeal dismissed.*

(1) 12 C.L.R. 64.
(2) (1858) 2 H. & N. 779 = 27 L. J. Ex. 262.
(3) (1876) L. R. 1 Q. B. D. 291.

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APPELLATE CIVIL.

27 C. 239.

27 C. 239.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Handley.

RACHHEA SINGH (*Defendant*) *v.* UPENDRA CHANDRA SINGH (*Plaintiff*).* [7th June, 1899.]

Rent, suit for—No alternative claim for use and occupation—Damages for use and occupation—Variance between pleading and proof—Ferry tolls.

In a suit for rent, when no alternative claim is made for use and occupation, no damages can be decreed for use and occupation.

Lukhee Kantoo Dass Chowdhry v. *Sumeeruddi Lusker* (1), and *Surendra Narain Singh* v. *Bhai Lal Thakur* (2), referred to and followed.

The Rent Law in Bengal does not apply to ferry tolls.

Nityanund Ghose v. *Kissen Kishore* (3), and *Lalun Monee* v. *Sona Monee Dabee* (4), distinguished. *Hari Mohan Sirkar* v. *Moncrieff* (5) applied.

[R., 17 C.W.N. 311=17 Ind. Cas. 646 (647) ; 6 Ind. Cas. 776=7 M.L.T. 419 (421) ; 10 C.L.J. 538=3 Ind. Cas. 346=6 M.L.T. 255.]

THE plaintiff was the proprietor of a 3½ annas share of the *taluq* Gangapur in which certain ghats are situated. The defendant took a lease of the 12½ annas share of the ghats from the plaintiff's co-sharer, Krishto Kamini Dasi, but the defendant used and occupied the 16 annas shares and collected the whole 16 annas of the ferry tolls. The plaintiff sued the defendant for the rent of his 3½ annas share. In the plaint no alternative claim was made for use and occupation.

[240] The Court of first instance, finding that there was no lease between the plaintiff and the defendant, dismissed the suit.

The plaintiff appealed from this decision, and the lower appellate Court found that the defendant collected the whole 16 annas of the ferry tolls, and that though the defendant entered into no contract with the plaintiff for the collection of these tolls and the payment to him of rent, yet he had made himself the plaintiff's tenant in respect of these *ghats* by use and occupation. The Subordinate Judge accordingly gave the plaintiff a decree for the rent sued for.

From this decision the defendant appealed to the High Court.

Babu *Saroda Churn Mitter*, and Babu *Haro Coomar Mitter*, for the appellant.—The plaintiff is not entitled to compensation for use and occupation in a suit for rent, especially when he has not asked for it in the plaint. *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker* (1) and *Surendra Narain Singh* v. *Bhai Lal Thakur* (2) lay this down.

Babu *Norendra Chundra Bose*, for the respondent.—Though there is no express contract, yet there is evidence that the plaintiff approved of what his co-sharer did. [RAMPINI, J.—But still there may be no privity.] The defendant held the *ghats* and therefore the rent law is applicable ; and it was laid down in *Nityanund Ghose* v. *Kissen Kishore* (3) and *Lalun Monee* v. *Sona Monee Dabee* (4) that in rent suits, though there is no contract to pay rent, yet rent must be paid for use and occupation.

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* Appeal from Appellate Decree No. 2198 of 1897, against the decree of Babu Jogesh Chundra Mitter, Subordinate Judge of Bhagulpur, dated the 22nd of May 1897, reversing the decree of Babu Bankin Chunder Mitter, Munsiff of Madhepura, dated the 24th of July 1896.

(1) 13 B.L.R. 243=21 W.R. 208.
(2) 22 C. 752.
(3) (1864) W.R. Sp. No. Act X, 82.
(4) 22 W.R. 334.
(5) 9 B.L.R. Ap. 14.

Babu *Saroda Churn Mitter* in reply.—The cases cited for the appellant are cases on agricultural land and have no bearing on this case. 1899 JUNE 7.

The judgment of the High Court (RAMPINI and HANDLEY, JJ.) was as follows :— APPELLATE CIVIL.

27 C. 239.

JUDGMENT.

The plaintiff sues the defendant for the rent of certain ferry *ghats*. The plaintiff is proprietor of a 3½ annas share of the *taluq* Gangapur in which the *ghats* are situated. The defendant **[241]** admits that he took a lease of the 12½ annas share of these *ghats* from the plaintiff's co-sharer Krishto Kamini Dassi, and contends that he and the plaintiff's servants used to collect the ferry tolls in the proportion of 12½ and 3½ annas. The Subordinate Judge has, however, found that the defendant collected the whole 16 annas of the ferry tolls during the period in suit. He further finds that the defendant entered into no contract with the plaintiff for the collection of these tolls and the payment to him of rent, but nevertheless holds that he has made himself the plaintiff's tenant in respect of these *ghats* by use and occupation, and has accordingly given the plaintiff a decree for the rent sued for.

The defendant appeals, and on his behalf it is urged that the rulings upon which the Subordinate Judge relies are rulings under the rent law and relate to the rent of agricultural land. The rulings in question are *Nityanund Ghose* v. *Kissen Kishore* (1) and *Lalun Monee* v. *Sona Monee Dabee* (2). On the other hand, the pleader for the appellant cites the cases of *Surendra Narain Singh* v. *Bhai Lal Thakur* (3) and *Lukhee Kanto Dass* v. *Sumeeruddi Lusker* (4), and contends that under them the plaintiff is not entitled to compensation for use and occupation of the ferry *ghats*, as he did not ask for such compensation in his plaint. It is clear, we think, that the rulings relied on by the Subordinate Judge do relate to agricultural lands and lay down how an implied tenancy in respect of such land may be constituted. But the subject of the present suit is not agricultural land. The suit relates to ferry tolls, to which it would appear the provisions of the rent law are not applicable ; [see *Hari Mohan Sirkar* v. *Moncrieff* (5)]. The cases of *Nityanund Ghose* v. *Kissen Kishore* (1) and *Lalun Monee* v. *Sona Monee* (2), therefore, would not seem to justify the decree which the Subordinate Judge has given the plaintiff in this suit.

[242] Then, in the case of *Lukhee Kanto Dass Chowdhry* v. *Sumeeruddi Lusker* (4) it was held that if a landlord sued for rent, he could not recover damages for use and occupation unless he made a claim to this effect in his plaint. This case was followed in that of *Surendra Narain Singh* v. *Bhai Lal Thakur* (3) which was a suit for the rent of a *hat*, and in which it was found that there was no lease, and consequently the plaintiff could not recover rent. The learned Judges who decided this case declined to allow the plaintiff a decree for damages for use and occupation, as to do so, it was said, would amount to allowing an amendment of the plaint in such a way as to convert a suit of one character into a suit of another and an inconsistent character.

The plaintiff in this suit, it is evident, never asked for anything but rent, and that being so, we consider the Subordinate Judge was not justified in giving him the decree he has given him. We accordingly allow this appeal and set aside the decree of the Subordinate Judge with costs.

Appeal allowed.

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(1) (1864) W. R. Sp. No. Act X, 82. (2) 22 W. R. 334. (3) 22 C. 752.
(4) 13 B.L.R. 243=21 W. R. 208. (5) 9 B. L. R. Ap. 14.

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Before Mr. Justice Banerjee and Mr. Justice Stevens.

RAM CHANDRA MUKERJEE AND OTHERS (*Defendants*) *v.* RANJIT SINGH (*Plaintiff*).* [25th July, 1899.]

Limitation Act (*XV of* 1877), *sch. II*, *arts.* 11,118 *and* 124—*Suit for possession of immoveable property on a declaration that a certain adoption was invalid—Civil Procedure Code* (*Act XIV of* 1882), *ss.* 244, 281—*Effect of claim preferred on behalf of a minor by the manager without the sanction of the Court of Wards—Court of Wards Act* (*Bengal Act IX of* 1879), *s.* 55—*Gift of immoveable property without delivery of possession, where the donor supports it, whether valid—Question in execution of decree—Right of suit.*

An order which was passed during his minority is not binding upon a person whose estate is under the management of the Court of Wards if the proceeding in which it was passed was not instituted by the manager [243] with the sanction of the Court of Wards, *i.e.*, of the Commissioner to whom the Court of Wards delegated its authority to grant such sanction.

In a suit brought by the plaintiff, as *shebait* of an idol, for recovery of possession of certain immoveable properties, or in the alternative in his own right as an heir to the last full owner, on a declaration that certain execution proceedings which were taken against a person who was not the legally adopted son of the last full owner, and therefore the sales held therein were not binding upon him, the defence (*inter alia*) was that the suit was barred by limitation under arts. 11 and 118, sch. II, of the Limitation Act.

Held, that inasmuch as the order under s. 281 of the Civil Procedure Code was passed during the plaintiff's minority, and as the proceeding in which the said order was passed was not instituted by the manager with the sanction of the Court of Wards, the suit was not barred under art. 11, sch. II, of the Limitation Act, although it was brought more than one year after the claim was rejected.

Held, also, that art. 118, sch. II, of the Limitation Act did not apply to a suit for possession of immoveable property, though it might be necessary for the plaintiff to prove the invalidity of an adoption.

Jagannath Prasad Gupta v. *Runjit Singh*(1) referred to.

A gift of immoveable property, followed shortly afterwards (pursuant to the terms of the gift) by mutation of names without any objection being made by the donor, was not invalid for the mere reason that the donor did not deliver actual possession.

Kalidas Mullick v. *Kanhaya Lal Pundit* (2), and *Dharmodas Das* v. *Nistarini Dasi* (3) referred to.

In a suit brought upon a mortgage bond after the death of the executant, who was the widow of the last full owner of the properties mortgaged, the present plaintiff, who was a minor at that time, appeared, represented by the manager under the Court of Wards and denied the widow's right to mortgage the properties in dispute. He subsequently withdrew his defence, but remained a party on the record, and a decree was made in his presence. At an execution proceeding taken against the minor son of the alleged adopted son of the last full owner without any notice to the present plaintiff, some of the mortgaged properties were sold. In a suit by him (the plaintiff) for recovery of possession of the said properties, the defence was that the suit was not maintainable by virtue of the provisions of s. 244 of the Civil Procedure Code.

Held, that inasmuch as the plaintiff was a party to the suit in which the decree was passed, his remedy, if he could object to the sale, was by an application under s. 244 of the Civil Procedure Code, and not by a separate suit.

[F., 9 C.W.N. 222; **Appr.**, 96 P.R. 1908 = 79 P.W.R. 1908; **R.**, 34 B. 546 = 12 Bom. L.R. 539 (542) = 7 Ind. Cas. 457; 30 C. 142; 30 C. 990 (997) = 7 C.W.N. 864;

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* Appeals from Original Decrees Nos. 114 and 134 of 1897, against the decree of Babu Biprodas Chatterjee, Subordinate Judge of Moorshidabad, dated the 22nd of December 1896.

(1) 25 C. 354. (2) 11 C. 121. (3) 14 C. 446.

26 M. 291 (305); 8 C.W.N. 843 (857); 15 C.W.N. 524 (529)=7 Ind. Cas. 427; 1 P.R. 1907=31 P.W.R. 1907; 81 P. R. 1914=203 P.L.R. 1914=104 P.W.R. 1914=25 Ind. Cas. 429; 20 C.L.J. 312=24 Ind. Cas. 899; D., 32 C. 265 (266).]

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[244] THESE appeals arose out of a suit for redemption of certain properties after declaration of the plaintiff's title to them as *shebait* of an idol, or in the alternative in his own right as an heir to the last full owner. The allegation of the plaintiff was that he was the great-grandson by adoption of the brother of Kumar Ram Chand's father, and that the disputed properties, which were four in number, belonged to the Nashipur Raj, and while being held by two of the plaintiff's ancestors in the Raj, namely, the said Kumar Ram Chand and his cousin Raja Kishen Chand, were made over to their cousin's widow Rani Jorao Kumari; that by a registered *ikrar*, dated the 12th Kartic 1266 B. S., Kumar Ram Chand dedicated (amongst others) his half share of the said properties (which was the subject-matter of the present suit) to the idol, appointing his wife Rani Anandamoyi *shebait* of the said idol; that on the death of Rani Jorao Kumari and of Kumar Ram Chand, Rani Anandamoyi, his widow, held possession of the disputed property as a *shebait*; that Rani Anandamoyi in 1288 B. S., being under the legal necessity of making a loan for the said idol, borrowed certain sums of money from defendants 3 and 7, and executed a usufructuary mortgage which the plaintiff was entitled to redeem; that in execution of a money decree obtained by one Bidyadhur Pandit against Rani Anandamoyi, properties Nos. 1 and 2 were sold and purchased by defendant No. 1, property No. 3 was purchased by defendants Nos. 3, 4, 5 and 6 through their agent one Sadanunda Chowdhry, and property No. 4 was purchased by Bidyadhur Pandit himself; that the said decree and the sale and the proceedings in connection therewith were collusive and fraudulent, and that the properties being *debutter* could not be sold for the debts if any, of Rani Anandamoyi; that the defendants Nos. 1, 3, 4, 5, and 6 derived no right, title or interest in those properties by their purchases, especially as the execution proceedings were carried on against one Hari Singh, said to be the son of one Sreenarayan Singh who was insane, and who was not the legally adopted son of Rani Anandamoyi; that subsequently two of the properties in dispute were again brought to sale in execution of a decree obtained by one Bishunchand Dhudhuria on an invalid mortgage said to have been executed by Rani Anandamoyi and were purchased by some of the defendants; that these purchases were all invalid, and that the plaintiff, as the great-grandson by adoption [245] of Kumar Ram Chand's father, became entitled to the properties in dispute as heir of Kumar Ram Chand and Rani Anandamoyi, since the death of the latter on the 27th of September 1883, as the *shebait* of the idol, or if the properties were held not to constitute a valid *debutter*, then in his own right.

The defence in substance mainly was that the suit was barred by limitation, inasmuch as it was brought more than one year after the rejection of the claim which was made to the properties in dispute on behalf of the plaintiff, upon those properties being attached in execution of Bidyadhur Pandit's decree, and also because Rani Anandamoyi held adverse possession for twelve years; that the properties in dispute had never been really and validly dedicated to the idol, but were held and owned by Rani Anandamoyi as her *stridhan*; that the plaintiff was not the heir of Rani Anandamoyi or Kumar Ram Chand, but Sreenarayan Singh was the heir of those two persons as the adopted son, and after him his son Hari Singh became entitled to those properties; that the proceedings

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in execution of Bidyadhur Pandit's decree and of Bishun Chand's decree were properly held, and the sales in execution of those decrees were valid and binding; and that the plaintiff was not entitled to redeem the mortgage before the expiry of the lease in favour of the defendant No. 3.

The Subordinate Judge held that the suit was not barred by limitation, the adverse order in the claim case not being binding on the plaintiff, the claim having been preferred on his behalf by the manager under the Court of Wards, without the sanction of the Court of Wards; that the properties in dispute had been validly dedicated to the idol; that the plaintiff was entitled to be the *shebait*; that the adoption of Sreenarayan was invalid by reason of want of authority on the part of Rani Anandamoyi from her husband; that the proceedings in execution of the decrees of Bidyadhur Pandit and Bishun Chand were valid, but could not affect the properties in dispute which were *debutter*; and that the plaintiff was entitled to redeem the mortgage to defendants 3 and 7, notwithstanding the non-expiry of the term of usufructuary mortgage, upon payment of the full amount due, and he accordingly gave the plaintiff a decree.

[246] Against this decision both parties appealed to the High Court.

Babu *Sharoda Churn Mitter*, and *Babu Promotho Nath Sen*, for the appellants in appeal No. 114 of 1897.

Dr. *Rash Behary Ghose*, Babu *Lal Mohan Dass*, Babu *Satis Chundra Ghose*, and Babu *Sridhur Dass Gupta*, for the respondent in that appeal.

Babu *Lal Mohan Dass*, Babu *Satis Chunder Ghose*, and Babu *Sridhur Dass Gupta*, for the appellant in appeal No. 134 of 1897.

Babu *Saroda Churn Mitter*, and Babu *Promotho Nath Sen*, for the respondent.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

JUDGMENT.

These two appeals arise out of a suit brought by the plaintiff Raja Ranjit Singh of Nashipur, for declaration of his title to certain immoveable properties and for recovery of possession of the same as *shebait* of the idol Sri Sri Lakshmi Narain Deb Thakur, or if the properties are found not to be *debutter* properties, then in the alternative in his own right as the heir of Kumar Ram Chand and his widow Rani Anandamoyi. The material allegations upon which the claim is based are, that the properties in suit which belonged to Kumar Ram Chand and were held by Rani Jorao Kumari, a female member of his family, for her maintenance, were dedicated by him by a deed dated the 4th of Kartick 1266, to the god Sri Sri Lakshmi Narain; that on the death of Jorao Kumari and of Kumar Ram Chand shortly after, Rani Anandamoyi, his widow, held possession of the properties as a *shebait*; that Rani Anandamoyi in 1288, as *shebait*, borrowed certain sums of money from defendants 3 and 7, and executed a usufructuary mortgage which the plaintiff was entitled to redeem; that in execution of a collusive decree obtained by one Bidyadhur Pandit against Rani Anandamoyi the properties in dispute were fraudulently brought to sale after substituting in place of Rani Anandamoyi one Hari Singh, son of Sreenarayan Singh, who was not the heir and legal representative of Rani Anandamoyi, and were purchased by defendants Nos. 1 to 6; that subsequently two of the properties in dispute were again brought [247] to sale in execution of a decree obtained by one Bishun Chand Dhudhuria on an invalid mortgage said to have been executed by Rani Anandamoyi, and were purchased by some of the

defendants; that these purchases were all invalid; and that the plaintiff, as the great-grandson by adoption of the brother of Kumar Ram Chand's father, has become entitled to the properties in dispute as the heir of Kumar Ram Chand and Rani Anandamoyi since the death of the latter on the 27th of September 1883, as *shebait* of the idol Sri Sri Lakshmi Narain, or if the properties be held not to constitute a valid *debutter*, then in his own right.

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The defendants put in separate written statements, and their defence, so far as it is necessary to consider it in these appeals, in substance was that the suit is barred by limitation, because it is brought more than one year after the rejection of the claim which was made to the properties in dispute on behalf of the plaintiff, upon those properties being attached in execution of Bidyadhur Pandit's decree, and also because Rani Anandamoyi held adverse possession of the same for twelve years; that the properties in dispute had never been really and validly dedicated to the idol Sri Sri Lakshmi Narain, but were held and owned by Rani Anandamoyi as her *stridhan*; that the plaintiff is not the heir of Rani Anandamoyi or Kumar Ram Chand, and Sreenarayan Singh was the heir of those two persons as their adopted son, and, after him his son, Hari Singh, became entitled to those properties; that the proceedings in execution of Bidyadhur Pandit's decree and of Bishun Chand's decree were properly held, and the sales in execution of those decrees were valid and binding; and that the plaintiff was not entitled to redeem the mortgage before the expiry of the lease in favour of defendant No. 3.

The Court below has held that the suit is not barred by limitation, the adverse order in the claim case not being binding on the plaintiff, as the claim was preferred on his behalf by the manager under the Court of Wards without the sanction of the Court of Wards; that the properties in dispute had been validly dedicated to the idol Sri Sri Lakshmi Narain; that the plaintiff was entitled to be the *shebait*; that the adoption of Sreenarayan was invalid by reason of want of authority on the part of Rani Anandamoyi from her husband; that the proceedings in execution of the decree of Bidyadhur Pandit and Bishun Chand were valid, but could **[248]** not affect the properties in dispute which were *debutter*; and that the plaintiff was entitled to redeem the mortgage to defendants Nos. 3 and 7, notwithstanding the non-expiry of the term of the usufructuary mortgage, upon payment of the full amount due; and it has accordingly given the plaintiff a decree.

Against that decree both parties have appealed, the appeal of the defendants being appeal No. 114, and that of the plaintiff appeal No. 134 of 1897.

In the appeal of the defendants it is contended, *first*, that the Court below is in error in holding that the properties in dispute were *debutter* properties; *secondly*, that the Court below is wrong in holding that the suit was not barred by limitation under art. 11 of the 2nd schedule of the Limitation Act; *thirdly*, that the Court below ought to have held that the suit was barred by limitation by reason of Rani Anandamoyi having held possession of the properties in suit in her own right for more than twelve years; *fourthly*, that the Court below is wrong in holding that the adoption of Sreenarayan was invalid, whereas it ought to have held that it was valid, or that, at any rate, the plaintiff's right to question that adoption was barred by limitation; *fifthly*, that the Court below ought to have held that the plaintiff's claim as heir of Kumar Ram Chand was not made out; *sixthly*, that the Court below ought to have held that the proceedings

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taken and the sales held in execution of the decrees of Bidyadhur Pandit and Bishun Chand Dhudhuria were binding on the plaintiff; and, *seventhly*, that the Court below ought to have held that the plaintiff was not entitled to recover possession before the expiry of the term of the usufructuary mortgage.

In the appeal of the plaintiff the only point urged is that the Court below is wrong in making the plaintiff liable for certain collection charges and interest for lapse of instalments under the mortgage which he is declared entitled to redeem.

We shall consider the appeal of the defendants first.

The first contention is sought to be based upon three grounds, namely, *first*, that the deed of dedication is not proved; *second*, that the endowment, even if otherwise good, must be invalid under the Hindu law, as the properties endowed were at the time of dedication [249] in the possession of Rani Jorao Kumari and the gift could not have been accompanied by possession; and, *third*, that even if the deed of dedication be genuine, it is fictitious and colourable only.

In support of the first ground, it is urged that the deed does not bear the signature of Kumar Ram Chand, but only bears his seal; that it was not produced in any case before the present; and that, taking the evidence of the plaintiff's witness Dhananjoy Mitter, who says Rani Jorao Kumari died a short time after the death of Kumar Ram Chand, along with the statement in paragraph 5 of the plaint that Rani Jorao Kumari died in Kartick, the registration of the deed must have taken place after Kumar Ram Chand's death.

But we are of opinion that these considerations are not sufficient to outweigh the effect of the direct evidence in favour of the deed, namely, the evidence of the witness Dhananjoy Mitter, whom the Court below considered a truthful witness, and whom we see no reason to disbelieve on this point, when that direct evidence is taken in connection with the fact that the deed was registered within three months after its execution, and was referred to in an application by Rani Anandamoyi to the Collector for mutation of names. As for the statement of the witness Dhananjoy Mitter that Rani Jorao Kumari died after Kumar Ram Chand, that must obviously be a mistake, as will appear from the deposition of Hanuman Das. Nor is the second ground urged in support of the first contention valid. It is by no means clear that under the Hindu law delivery of possession is absolutely necessary to make a gift of immoveable property valid. But it is unnecessary to consider that point in this case, as the gift was followed within a short time by mutation of names pursuant to its terms upon the death of Rani Jorao Kumari, without any objection from the donor. The view we take is in accordance with that taken in the cases of *Kali Das Mullick* v. *Kanhaya Lal Pundit* (1), and *Dharmodas Das* v. *Nistarini Dasi* (2).

But we are of opinion that the first contention is entitled to succeed on the last of the three grounds urged in its support, namely, that the dedication was nominal and colourable only, [250] made with a view to protect the property covered by it against the claims of creditors.

About the time of the execution of the deed of dedication, Kumar Ram Chand was heavily involved in debt, as is clear from the evidence of Dhananjoy Mitter, one of the plaintiff's own witnesses, and of Hanuman Das, who was cited by both parties, and from the application by Mehdi

(1) 11 C. 121 = 11 I. A. 218. (2) 14 C. 446.

Ali for execution of decree against Kumar Ram Chand, dated the 27th June 1859 (Ex. A 28); and the Court below is wrong in holding that the fact of Rani Anandamoyi having purchased Mehdi Ali's decree shortly after the death of Kumar Ram Chand is sufficient to remove the doubt arising against the *bona fide* character of the endowment. The learned Subordinate Judge does not refer to the circumstances under which that decree was purchased by Rani Anandamoyi and to the transactions that followed her purchase of the decree; and they are, so far as may be gathered from the evidence on the record, of importance in the determination of the present question.

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The deed of dedication was executed when Mehdi Ali's application for execution of his decree for realization of upwards of one lakh of rupees in execution case No. 100 of 1859 was pending; see Exs. A 28 and A 12. This last-mentioned application was struck off in September 1860; and the decree was purchased by Rani Anandamoyi *benami* in the name of Kali Kumar Guha. What led to the purchase of the decree by her is not very clear; but it appears from the recital in the bond (Ex. A 40), which she executed in favour of defendant No. 3, and which the plaintiff admits he is bound to pay off, that she purchased the decree after the endowment had been held void, and the properties covered by it ordered to be sold in execution of that decree. This recital may not be strictly binding on the plaintiff; but what followed clearly shows that it is true.

For after the purchase of the decree by Rani Anandamoyi, who then became both judgment-debtor and judgment-creditor, what she did was not to enter up satisfaction, but to take out execution in the name of her *benamdar*, to bring to sale the properties covered by the deed of endowment, and to purchase them *benami* in the name of Kali Kumar Guha and to take a conveyance (Ex. 23) in December 1864 from Kali Kumar Guha. These fictitious and **[251]** collusive transactions are wholly incompatible with the theory of the endowment being a real and *bona fide* one, and become intelligible only if the dedication was made with the object of protecting the properties against the claims of creditors.

We may add that the deed of dedication itself bears evident marks of its being the result of such a design. For the deed says that the properties mentioned in it are dedicated to the idol Sri Sri Lakshmi Narain, because the donor had appropriated to his own expenses the sum of Rs. 8,000 belonging to the idol, and he had no other property out of which to pay off the debt due to the idol. Now this statement is evidently false, as there is no reliable evidence in support of it; and the object of inserting such a statement was obviously to make the dedication appear to be a transfer for value, and therefore valid against creditors.

In dealing with the question whether an endowment is real or nominal only, the manner in which the dedicated property is held and enjoyed is the most important point for consideration. Now in the present case there is no sufficient and reliable evidence to show how, during the few months for which the donor lived after the dedication, the income of the properties in dispute was spent; nor is there any such evidence in respect of any period subsequent to his death. It is true there is some vague oral evidence that Rani Anandamoyi all along performed the worship of the idol Sri Sri Lakshmi Narain; but the idol being a family idol, she would perform its worship, as every Hindu does, whether there is any endowment in favour of the idol or not. No accounts have been filed such as a rich and respectable family like that of the donor is expected to have, showing how the income of the properties in dispute

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was spent. On the contrary, Rani Anandamoyi, though she got her name registered in the Collectorate in respect of these properties as *shebait*, brought them to sale in execution of Mehdi Ali's decree through her *benamdar* Kali Kumar Guha, purchased them herself, and then mortgaged them in several instances, treating them as her own. It is true, as has been pointed out by the Privy Council in *Juggutmoheenee Dossee* v. *Sookheemonee Dossee* (1) that a mere abuse of trust by a trustee for the time being cannot affect the validity of an endowment [252] where there is no question about its being a real and valid endowment originally; but when the question is whether an endowment is real or fictitious, the mode of dealing with it by the donor and his successors must be an important matter for consideration.

Lastly, we find that after Rani Anandamoyi's death, and after the plaintiff had attained majority, when the properties in dispute were attached in execution of a decree against Rani Anandamoyi or her legal representatives, the plaintiff claimed them in his own right as the heir of Kumar Ram Chand, without making any mention of the properties being *debutter* (see Ex. D). For all these reasons we are of opinion that this endowment is not a real one, but is only colourable and fictitious.

The second contention of the appellants is, in our opinion, not well founded. It is quite true that a claim was put in on behalf of the plaintiff by the manager of his estate under the Court of Wards, and that claim was disallowed under s. 281 of the Code of Civil Procedure, and this suit is brought more than one year after the rejection of the claim; but the question is whether the claim was preferred by the manager with the sanction of the Court of Wards, that is, of the Commissioner, to whom the power of granting such sanction has been delegated, so as to make the order passed upon it binding on the plaintiff. Section 55 of the Court of Wards Act (Bengal Act IX of 1879) enacts that no suit shall be brought on behalf of any ward by a manager unless the same be authorized by some order of the Court of Wards, and the term "suit" in this section has been held in the case of *Bhoopendro Narain Dutto* v. *Baroda Prosad Roy Chowdhry* (2) to include miscellaneous proceedings, so that the order in the claim case upon which the plea of limitation is based can be binding on the plaintiff only if the proceeding in which it was passed was instituted by the manager with the sanction of the Court of Wards. This the learned vakil for the appellants does not dispute. But he argues that, in the absence of evidence to the contrary, the presumption should be in favour of the claim case having been properly instituted. Granting that that is so, we have such evidence furnished by the correspondence filed in the case (see Exs. B and D.) as it shows that the claim was preferred [253] with the sanction of the Collector, but without that of the Commissioner, to whom alone the Court of Wards has delegated its authority to grant such sanction (see Wards' Manual, p. 50, Rule 8). The claim not having been instituted with the necessary sanction, the plaintiff is not bound by the order made in the claim case; and the suit is not, therefore, barred by limitation under art. 11 of sch. II of the Limitation Act.

The third contention of the appellants may be shortly disposed of. The properties in dispute not being *debutter*, and the plaintiff being entitled to them, if at all, only in his own right as the heir of Kumar Ram Chand, limitation runs against him under art. 141 of sch. II of the Limitation

(1) 14 M.I.A. 289 = 10 B.L.R. 19 = 17 W.R. 41. (2) 18 C. 500.

Act only from the date of Rani Anandamoyi's death; and her possession cannot affect the plaintiff prejudicially.

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In support of the first branch of the fourth contention, namely, that the validity of the adoption of Sreenarayan Singh has been made out, the learned vakil for the appellants relies upon the registered deed of the 4th of Falgoon 1275 corresponding to some day of February 1869 (Ex. I), by which Sreenarayan was given in adoption, and on the fact of Sreenarayan Singh having been recognised as the adopted son of Kumar Ram Chand, and he asks us to presume from the fact of such recognition that the adoption was made by Anandamoyi with her husband's authority. The recognition of the adoption by the members of the family, granting that the evidence on the point is perfectly reliable, is not shewn to have been of a nature such as would justify our inferring the existence of authority, in a case like the present, in which it is not alleged that time has destroyed evidence, and in which a written authority is filed, the attesting witnesses to which are living, but have not been examined. The defendants tried to prove the existence of authority by actually producing a deed of permission (Ex. J.), whereof proper custody is not proved; and they cited four witnesses (two of whom are attesting witnesses to the deed), but omitted to examine any of those witnesses, without giving any good reason for such omission. In these circumstances, we think the Court below was quite right in holding that no authority to adopt Sreenarayan has been proved.

We come next to the second branch of the fourth contention, namely, that even if the adoption of Sreenarayan was invalid, the [254] plaintiff's right to question its validity is barred by art. 118 of sch. II of the Limitation Act. In support of this contention, the learned vakil for the appellant relies upon the cases of *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (1) and *Mohesh Narain Munshi* v. *Taruk Nath Moitra* (2); and he argues that though the present suit is not one for obtaining a mere declaration that the adoption of Sreenarayan Singh is invalid, yet, so far as it is necessary for the plaintiff's success that that adoption should be declared invalid, the suit must fail. We are of opinion that this contention is not sound. The period of limitation prescribed in art. 118 applies, as the plain language of the article shows, only to a suit to obtain a declaration that an adoption is invalid, that is, to a suit for a declaratory decree, and it does not apply to a suit for possession of immoveable property, though it may be necessary for the plaintiff in such a suit to prove the invalidity of an adoption. The language of the corresponding provision of the Limitation Act of 1871, with reference to which the two cases cited for the appellants were decided, was different from that of the present law; and the period now prescribed, namely, six years, is only one-half of that under the former Act. It is not likely, therefore, that the Legislature could have intended to make art. 118 of the present law applicable to a suit for possession of immoveable property, though it may involve the question of the invalidity of an adoption, when the plaintiff would have twelve years' time to institute such a suit, even where it may be necessary for him to establish the illegitimacy of the defendant. Moreover, if the appellant's contention were correct, it would lead to another very anomalous result. A widow having daughters and daughters' sons, who are the next reversioners, may, without authority from her husband, adopt a son, and no suit may be brought by

(1) 13 C. 308 = 13 I. A. 84. (2) 20 C. 487 = 20 I. A. 30.

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the daughters or their sons for setting aside the adoption within six years; the widow may survive her daughters and their sons; and ultimately on her death a distant relative may become entitled to succeed as the reversionary heir; and he would find himself barred long before he had any chance of becoming entitled to the inheritance. The effect of the two cases cited for [255] the appellants upon the present law was considered by this Court in the case of *Jagannath Prasad Gupta* v. *Runjit Singh* (1), and the view we now take is in accordance with that taken in that case. What is strongly relied upon in this case for the appellant is a passage in the judgment of their Lordships of the Privy Council in *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (2), in which their Lordships, referring to the words of the present law, say: "It seems to be more than doubtful whether, if these were the words of the Statute applicable to the case, the plaintiff would thereby take any advantage." With reference to this passage, this Court, in the case of *Jaggannath Prasad Gupta* v. *Runjit Singh* (1), observed: "What their Lordships considered to be more than doubtful, even if the language of the old law (art. 129 of Act IX of 1871) were the same as that of the present law (art. 118 of Act XV of 1877), was not whether that would make any change in the law, but whether the plaintiff would take any advantage, that is, whether the plaintiff in the case before their Lordships would succeed under the circumstances of the case;" and then the reason for taking this view is further explained in the passage that follows. We take the same view in this case.

The fourth contention of the appellants must therefore fail.

In support of the fifth contention, all that is urged is that the evidence adduced to show that the family of the plaintiff is governed by the law of the Benares School, is insufficient. We have considered that evidence, and we see no reason to dissent from the conclusion arrived at by the Court below.

In support of the sixth contention, the learned Vakil for the appellants argues that the Court below, having found that the proceedings in execution of the decrees of Bidyadur Pandit and Bishun Chand Dhudhuria were properly taken, ought to have held that the sales in execution of those decrees were binding on the plaintiff. On the other hand, it was urged for the respondent by way of cross-objection that the Court below was wrong in holding that the proceedings in execution were rightly taken. We think this contention of the respondent is valid. The property not being [256] *debutter*, Sreenarayan Singh not being the validly adopted son of Kumar Ram Chand, and the plaintiff being, by the Hindu law of the Benares School which governs the parties, the heir of Kumar Ram Chand and of Rani Anandamoyi, any proceedings taken in execution, in the absence of the plaintiff and on the substitution of Sreenarayan Singh or his son as the legal representative of Rani Anandamoyi, must be ineffectual in affecting the plaintiff's right. The cases relied upon by the Court below in support of the opposite view, namely, the cases of *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (3), *Dunput Sing Bahadoor* v. *Rajessuree* (4), and *Sankara Subbayyar* v. *Ramasami Ayyangar* (5) are distinguishable from the present. In the first mentioned case, namely, that of *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (3), the facts were of a very peculiar nature, the party entitled to represent the deceased, namely, the executor to his will,

(1) 25 C. 354 (363). (2) 20 C. 487 = 20 I. A. 30. (3) 4 C. 342.
(4) 15 W.R. 476. (5) 20 M. 454.

having kept secret the existence of the will until after the creditor had obtained his decree against a party in possession of the estate of the deceased. Moreover, the hardship and injustice to the creditor, which led the learned Judges to take the view they have taken, no longer exists, as by ss. 21 and 23 of the Probate and Administration Act (V of 1881) the creditor himself can obtain letters of administration to the estate of his deceased debtor. The next case, *Roodro Narain Roy* v. *Nittyanund Doss* (1), has very little bearing upon the present question. The third case relied upon, namely, that of *Dunput Sing Bahadoor* v. *Rajessuree* (2), was decided with reference to s. 210 of the former Code of Civil Procedure (Act VIII of 1859) according to which execution might be had against the legal representative *or the estate of the deceased judgment-debtor.* But under the present law, s. 234 of the Code of Civil Procedure (Act XIV of 1882), which corresponds to s. 210 of the old Code, the words " or the estate " have been left out. The **[257]** last case cited merely followed the case of *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (3).

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But, though that is so, so far as the grounds common to the execution proceedings under the two decrees are concerned, the case in which Bishun Chand Dhudhuria was the decree-holder stands on a different footing. Unlike the decree of Bidyadhur Pandit, which was obtained against Rani Anandamoyi, the decree of Bishun Chand Dhudhuria was passed in a suit which was brought after Rani Anandamoyi's death, and in which the present plaintiff Ranjit Singh was made a defendant. He was then a minor under the Court of Wards, and was represented by the manager under the Court of Wards. He made his defence denying Anandamoyi's right to mortgage the properties then in dispute (see Ex. A 2), though subsequently he retired from his defence as the judgment (Ex. A 5) shows; but it is clear from the decree (Ex. A 4) that he remained a party on the record, and the decree was made in his presence. Therefore, though the subsequent execution proceedings were taken against Hari Singh, minor son of Sreenarayan Singh, represented by his mother, Luchmi Bibi, without any notice to the present plaintiff, Ranjit Singh, yet he being a party to the suit in which the decree was passed, his remedy, if he could object to the sale that has taken place, was by an application under s. 244 of the Code of Civil Procedure, and not by a separate suit which is barred by that section. Moreover, we think it more than doubtful whether, after having been made a party to the suit along with the minor Hari Singh, and having retired from his defence, he can now object to any sale of the properties covered by the mortgage bond on which the suit was based. In our opinion, therefore, this suit, so far as it relates to the properties Nos. 2 and 4 of the plaint, namely, Taraf Kulubaria and Bajitpur and Taraf Chutipur, which were included in the suit of Bishun Chand (see Exs. A 3 and A 4) and were sold in execution of his decree (see Exs. A 19 and A 21) must be dismissed.

It was argued for the appellants that the suit as regards the properties sold in execution of Bidyadhur Pandit's decree was likewise barred by s. 244 of the Code of Civil Procedure. **[258]** We do not consider this argument correct, because that decree was passed against Rani Anandamoyi, and the present plaintiff was not a party to the suit in which that decree

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(1) 8 W.R. 195. (2) 15 W.R. 476. (3) 4 C. 342.

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was passed, nor does he claim to be a representative of the Rani. He claims as heir of the Rani's husband, Kumar Ram Chand.

The seventh and the last contention of the appellants is, that the plaintiff is not entitled to redeem the mortgage to defendants 3 and 7 before the expiry of the term of the usufructuary lease. We do not consider his contention correct. The lease, as has been found by the Court below, and as is admitted in the argument for the appellants, is part of the mortgage transaction, and so the mortgagee is entitled to the mortgage money with interest and costs, but is not entitled to make any profit by the lease. That being so, and the redemption decree that has been made directing the payment by the plaintiff to the mortgagee, not merely of the present worth of the money due, but of the entire amount due, the defendants can have no reason to complain of the decree made.

It remains now to consider the appeal of the plaintiff. The contention in that appeal is, that of the amount which the plaintiff has been ordered to pay for the redemption of the mortgage, one portion consisting of two items, namely, the sum of Rs. 388-14, he is not bound to pay under the terms of the mortgage. This contention is admitted by the learned Vakil for the defendants (appellants) to be well founded and must therefore prevail.

The result then is that the decree of the Court below must be set aside, and in lieu thereof a decree will be made, dismissing the plaintiff's prayer for a declaration that the properties in suit are *debutter* properties of the idol Sri Sri Lakshmi Narain Deb Thakur, dismissing also his claim for possession of properties Nos. 2 and 4 of the schedule to the plaint, and decreeing his claim for possession of the other two properties, namely, properties Nos. 1 and 3, in his own right, and directing that on his depositing in the Court below, within six months after this date, the sum of Rs. 9,006-8 due in respect of the ijara to Rani Mena Kumari Bibi, defendant No. 7, the plaintiff be put in possession of the two properties Nos. 1 and 3. The parties will pay and recover costs in this Court and the Court below in proportion to their success and failure.

[259] It has been brought to our notice by the learned Vakil for the plaintiff (respondent) that the mortgagee, defendant, being in possession as usufructuary mortgagee the amount that should have to be actually paid for redemption of the property ought to be only the amount of the mortgage debt that remains to be satisfied after giving the mortgagor credit for the amount realisable for the period during which the appeals have been pending, in addition to the amount for which credit has been given by the Court below. After hearing the learned vakil for the mortgagee, we think the objection taken is well founded, and that the amount that is payable by the plaintiff for the redemption of the property should be only the total of the amounts that are realizable for the years 1306 and 1307 B. S. at the rate of Rs. 2,071-8-0 per annum according to the account adopted by the Court below; and we, therefore, direct that the decree be drawn up accordingly.

S. C. G. *Decree varied.*

27 C. 259=4 C.W.N. 420.

1899 AUG. 22.

CRIMINAL REVISION. 27 C. 259=4 C.W.N. 420.

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Pratt.

SRI MOHAN THAKUR, 1*st Party* (*Petitioner*) *v.* NARSING MOHAM THAKUR AND OTHERS, 2*nd Party* (*Opposite Party*).*
[22nd August, 1899.]

Criminal Procedure Code (*V of* 1898,) *s.* 145—*Dispute regarding right to collect rents—Jurisdiction of Magistrate—Appointment of Receiver of the joint estate.*

There is no want of jurisdiction in a Magistrate to proceed under s. 145 of the Criminal Procedure Code, because the dispute is one regarding the right to the collection of rents between joint owners governed by the Mitakshara School of Hindu Law. Nor can the appointment of a Receiver of the joint estate, subsequent to the passing of the order by the Magistrate, affect the question of the jurisdiction of the Magistrate at the time when he passed the order.

[**Diss.**, 23 P.R. 1902=135 P.L.R. 1902; **R.**, 11 C.L.J. 412=11 Cr. L.J. 370 (371)=6 Ind. Cas. 544; 2 L.B.R. 239 (241) (**F.B.**); **D.**, 36 C. 986=11 Cr. L.J. 28 (29)=4 Ind. Cas. 696; 10 C.W.N. 1088.]

THE first party and the second party were the joint owners of a property, and they appointed a common manager for the purpose of collecting rents jointly. The first party alleged that subsequently **[260]** he dismissed the manager, and from the date of dismissal by him the manager had no authority to act on his behalf. Disputes arose as to the right of the first party to collect rents separately on his own behalf. The Magistrate took proceedings under s. 145 of the Criminal Procedure Code, and made an order in favour of the second party.

Mr. *Jackson*, and Babu *Lal Mohun Ganguli*, for the petitioners.

Mr. *Pugh*, Babu *Dwarka Nath Chakrabarty*, and Babu *Joy Gopal Ghose*, for the opposite party.

The judgment of the High Court (RAMPINI and PRATT, JJ,) was as follows:—

JUDGMENT.

This is a rule calling upon the opposite party to show cause why the order of the Magistrate in this case, passed under s. 145 of the Code of Criminal Procedure, dated the 24th April 1899, should not be set aside for the reasons stated in the affidavit.

Mr. Pugh for the opposite party has appeared to show cause. It is quite clear that, under the provisions of s. 145, as now amended, no order under that section can be set aside by this Court in its revisional jurisdiction, except under the provisions of the Charter, and on the ground of want of jurisdiction. This is apparent, not only from the terms of s. 435, cl. (3), but from the ruling of this Court in the case of *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (1).

The learned Counsel (Mr. Jackson) who appears on behalf of the petitioner has urged that the Magistrate had no jurisdiction upon two grounds—*first*, that the dispute in this case is as to the right to collect rent; and, *secondly*, that it is a dispute between two joint owners governed by the Mitakshara law. He further contends that the order should be set aside, because a Receiver to the property has subsequently been appointed by this Court in its civil jurisdiction.

* Criminal Revision No. 487 of 1889, made against the order passed by J.G. Ritchie, Esq., District Magistrate of Bhagulpur, dated the 24th April 1899.

(1) 26 C. 188.

1899 AUG. 22. — CRIMINAL REVISION. — 27 C. 259 = 4 C.W.N. 420.

Now, with regard to the first two of these grounds, we need only say that, under the provisions of s. 145, cl. (2), we think there is no want of jurisdiction on the part of the Magistrate because the dispute in this case was a dispute regarding [261] the collection of rent between joint owners governed by the Mitakshara law; and, moreover, it appears to us that this point has already been decided in this very case by a Division Bench consisting of O'Kinealy and Stanley, JJ., on the 3rd February 1899 (1) when an attempt was made to stay these proceedings, and the Bench directed that the proceedings should go on, and we think that the purport of their order is that there was no want of jurisdiction in the Magistrate with regard to this case. Then as to the subsequent appointment of Mr. Grey as Receiver, we do not think that that can affect the question of jurisdiction at all. Mr Grey was not appointed as Receiver until after the order of the Magistrate in this case was passed, and his subsequent appointment cannot affect the question of the jurisdiction of the Magistrate at the time he passed the order.

Mr. Jackson, however, urged that Mr. Grey's appointment as Receiver has superseded the order of the Magistrate under s. 145. If that be so, on which we express no opinion, then [262] we can only say that it is unnecessary for us, in our criminal jurisdiction, to set aside an order which, we are told, has been already superseded by this Court in its civil jurisdiction. For these reasons we think that this rule should be discharged, and we accordingly discharge it.

S. C. B. *Rule discharged.*

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(1) Criminal Revision 952 of 1898. In this case an application was made to set aside the order of the Magistrate on the ground that it was not a matter concerning which he had jurisdiction to make an order under s. 145 of the Criminal Procedure Code. The High Court (PRINSEP and STANLEY, JJ.) said:—

ORDER.

"This is a Rule calling upon the Magistrate of the district and the opposite party to show cause why the proceeding of the Magistrate, dated the 5th December, drawn up under s. 145 of the Code of Criminal Procedure, should not be set aside on the ground that s. 145 does not apply to joint owners of a Mitakshara family.

The real owners of the property are the son and grandson of one Brojo Mohan Thakur, and they appointed a person to collect the rents of this property. One of the owners now claims to have dismissed the person so appointed to collect the rents and to go in and collect the rent himself direct. There is no dispute as to the shares, but the dispute is as to the right to go in and collect the rents and break up the present arrangement by which the rents are collected on behalf of all. That is certainly a dispute concerning rents, and the question of possession is one to be found by the Magistrate on evidence. We are not in a position to prejudge the case and to do what the Magistrate has to do.

We therefore think that at this stage of the case it will not be right in us to interfere with the proceediugs, and we accordingly discharge the Rule.

27 C. 262.

1899
Nov. 6.

CRIMINAL REFERENCE.

27 C. 262.

CRIMINAL REFERENCE.

Before Mr. Justice Sale and Mr. Justice Stanley.

WOOLFUN BIBI (*Complainant*) *v.* JESARAT SHEIKH AND ANOTHER (*Accused*).* [6th November, 1899.]

Defamation—Statements made by persons in the course of their evidence as witnesses in Court of Justice—Relevancy of statements to issue in case—Penal Code (Act XLV of 1860), *s.* 500.

Where certain statements alleged to be defamatory were made by certain persons in the course of their evidence as witnesses in a Court of Justice and were relevant to the issue in the case under enquiry, *Held*, that such persons could not be prosecuted for defamation in respect of those statements.

[**Diss.**, 13 Cr. L.J. 494=15 Ind. Cas. 494=5 P.R. 1913 Cr.=31 P.W.R. 1912 Cr. 24; P.L.R. 1912; **R.**, 29 A. 685 (693, 701)=4 A.L.J. 605=27 A.W.N. 235=6 Cr. L. J. 197; 13 Cr. L.J. 275=14 Ind. Cas. 659=23 M.L.J. 39 (44)=11 M.L.T. 416=(1912) M.W.N 476; **D.**, 32 C. 756=2 C.L.J. 105 (106)=9 C.W.N. 911; 40 C. 433=17 C.W N. 297=14 Cr. L. J. 100=18 Ind. Cas. 660.]

THE accused in this case were witnesses for the defendant in a certain civil suit in the Court of the Munsif of Lalbagh. In the course of their depositions they made the following statement regarding the complainant; "Hasil's daughter (that is complainant) was caught with a chamar and lives with him." The Magistrate who tried the accused on the woman's complaint found that the statement made by them was not true, and was not made in good faith. He therefore convicted the accused under s. 500 of the Penal Code for defamation, and sentenced them each to pay a fine of Rs. 25 or in default to suffer one month's simple imprisonment. The Sessions Judge referred the case for orders to the High Court under s. 438 of the Code of Criminal Procedure.

The material portion of the letter of reference was as follows:—

"1. The petitioners before me, Jesarat Sheikh and Panchu Sheikh, were witnesses for the defendant in a certain civil suit in the Court of the Munsif of Lalbagh. In the course of their depositions they made the following statement regarding the complainant "Hasil's daughter (that is complainant) was caught with a chamar and lives with him." The Magistrate **[263]** who tried the petitioners on the woman's complaint has found that the statement made by them was not true and was not made in good faith. He has therefore convicted the petitioners under s. 500, Indian Penal Code.

"2. The order recommended for revision is the order of the Honorary Magistrate of Lalbagh, dated the 29th July 1899, convicting the petitioners under s. 500 of the Penal Code and sentencing them each to pay a fine of Rs. 25, or, in default, to suffer one month's simple imprisonment.

"3. The cases of *Manjaya* v. *Sesha Shetti* (1) *Empress* v. *Babaji* (2), and *Empress* v. *Bal Krishna Vithal* (3) are authorities for the proposition that witnesses cannot be prosecuted for defamation on account of statements made when giving evidence in the witness box. I do not find any reported decisions of the Calcutta High Court directly in point, but the case of *Bhikumber Singh* v. *Becharam Sircar* (4), and the Privy Council

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* Criminal Reference No. 222 of 1899, made by W. Teunan, Esq., Sessions Judge of Murshedabad, dated the 11th of October 1899.

(1) 11 M. 477. (2) 17 B. 127. (3) 17 B. 573. (4) 15 C. 264.

1899 Nov. 6. — CRIMINAL REFERENCE. — 27 C. 262.

case of *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (1) would appear to favour the view taken in Madras and Bombay.

"4. I should also point out that the reasons given by the Magistrate for holding that the statement was not made in good faith do not appear to be sound. On this point he says: "In the present case there is no proof that the accused had to make the statement in answer to a question." Now the statements were proved, not by the production of certified copies of the depositions, but by the admissions of the accused. It should have been presumed that statements made by a witness in the witness box were in answer to questions put to him and were not irrelevant. In the depositions of the pleaders who were engaged in the civil suit, there is also evidence that the statements were relevant (*vide* the last sentence in the deposition of witness Debendra Nath Sen).

"5. The Honorary Magistrate in his explanation refers to his judgment and offers no further remarks."

The judgment of the Court (SALE aud STANLEY, JJ.) was as follows :—

JUDGMENT.

It is clear that the statements alleged to be defamatory were made by the accused in the course of their evidence as witnesses in a Court of Justice, for these statements were relevant to the issue in the case under enquiry. Under these circumstances, upon the authorities cited by the Officiating Sessions Judge, we think that the accused cannot be prosecuted for defamation in respect of these statements, and that the conviction and sentence must be set aside, the fine, if paid, to be refunded.

D. S.

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27 C. 264=4 C.W.N. 13.

[264] ORIGINAL CIVIL.

Before Mr. Justice Sale.

RAM NARAIN AND ANOTHER *v.* DWARKA NATH KHETTRY.*
[26th July, 1899.]

Sale in execution of decree—Sale by Sheriff—Civil Procedure Code (Act XIV of 1882), *s.* 244, *cl.* (*c*), *ss.* 287, 311, 313—*Belchamber's Rules and Orders of High Court, Calcutta*, 382-386—*Deficiency in area of land—Application by purchaser to set aside sale or for compensation.*

A purchaser at an execution sale of immoveable property held by the Sherif, applied to set aside the sale or for compensation on the ground of deficiency in the area of the land sold.

Held, that such an application in relation to sales held by the Sheriff was not sanctioned by any provisions of the Civil Procedure Code, and s. 313 did not apply.

Held, also, that as the interest of the purchaser was adverse to the interest of the judgment-debtor the former was not the representative in interest of the latter, and therefore s. 244 of the Civil Procedure Code did not apply.

Ishan Chunder Sircar v. *Beni Madhub Sircar*, applied (2).

Sales by the Sheriff differ from sales by the Registrar of the original side of the High Court. The rules of the Court governing sales by the Registrar direct that compensation shall be allowed for errors and misstatements, if capable of compensation, while no such condition is imposed on sales by the Sheriff.

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* Suit No. 14 of 1892.

(1) 11 B.L. R. 321. (2) 24 C. 62.

1899 JULY 26. — ORIGINAL CIVIL. — 27 C. 264=4 C.W.N. 13.

THIS was an application, made in Chambers by a purchaser of immoveable property at a sale held by the Sheriff in execution of a decree, for an order that the sale might be set aside, or he be allowed to retain out of the balance of the purchase-money a sum of Rs. 1,628 as compensation for an alleged deficiency in area of the land sold to him. The sale proclamation signed by the Sheriff and issued under the provisions of s. 287 of the Civil Procedure Code contained the statement that the property to be sold was "rent-free land measuring about 1 cottah 15 chittacks and 5 square feet, with a three-storeyed house and premises erected thereon." The purchaser alleged that the statement in the notification as to the area of the land sold was incorrect, that there was a deficiency in [265] this respect of 4 chittacks and 10 square feet, and that he had been misled by this mis-statement and had been induced in consequence to pay a higher price than he would otherwise have done. The only question raised in the suit was whether the purchaser was entitled to adopt this summary procedure for the purpose of obtaining the relief he sought.

Mr. *Dunne* (Mr. *Chakravarti* with him), for the auction purchaser.—This is an application under s. 244 of the Civil Procedure Code to set aside the sale on the ground of misdescription and fraud. Section 244 applies. In *Bhubon Mohan Paul* v. *Nunda Lal Dey* (1), it was held that an application to set aside a sale on the ground of fraud would come under that section, even though the purchase was made by a person who was a third party. [SALE, J.—If such applications can be brought under s. 244, why was s. 311 enacted ?] That section provides for a procedure, while s. 313 deals with the rights of the purchaser. Those sections provide for particular cases only.

Mr. *Sinha*, for the judgment-creditor.—There is no provision in the Code, or anywhere else, under which the auction-purchaser can apply to set aside a sale held by the Sheriff. A separate suit must be instituted for this purpose. Section 244 provides a summary procedure for parties to the suit only. Section 311 provides a summary procedure for the relief of the decree-holder, but only in the case of material irregularity. Section 313 deals with the rights of the purchaser and provides a summary procedure for his relief, but only in cases where the judgment-debtor had no saleable interest in the land sold. A mis-statemant of fact as regards the quantity of land to be sold is no ground for setting aside a sale. *Durga Sundari Devi* v. *Govinda Chandra Addy* (2); see also *Protap Chunder Chuckerbutty* v. *Panioty* (3), and *Ram Coomar Dey* v. *Shushee Bhooshun Ghose* (4). Unless the auction-purchaser can come in under s. 313 of the Civil Procedure Code, he must bring a separate suit. *Birj Mohun Thakur* v. *Rai Umanath Chowdhry* (5). The case of *Bhubon Mohun Paul* v. [266] *Nunda Lal Dey* (1) is distinguishable. The real distinction is that where the parties to the suit initiate proceedings, s. 244 applies, and their right is not affected by the presence of the auction-purchaser in those proceedings; but where the auction-purchaser initiates proceedings, he must bring a suit; he cannot take advantage of s. 244. *Hira Lall Ghose* v. *Chundra Kanto Ghose* (6).

Babu *Atul Chundra Ghose* for the judgment-debtor cited *Hira Lal Chatterji* v. *Gourmoni Debi* (7).

Mr. *Dunne* in reply.—The Court, while deciding the case of *Birj Mohun Thakur* v. *Rai Umanath Chowdhry* (5), do not appear to have had their

(1) 26 C. 324. (2) 10 C. 368. (3) 9 C. 506. (4) 9 C. 626.
(5) 20 C. 8=19 I.A. 154. (6) 26 C. 539. (7) 13 C. 326.

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attention directed to s. 244, and they did not have that section in their minds while deciding that case.

ORDER.

SALE, J.—This is an application by a purchaser of immoveable property at a Sheriff's sale for an order either that the sale may be set aside, or that he be allowed to retain out of the balance of purchase-money a sum of Rs. 1,628 as compensation for an alleged deficiency in area of the land sold to him. The sale proclamation signed by the Sheriff, and issued by him under the provisions of s. 287 of the Civil Procedure Code, contained the statement that the property to be sold was "No. 56, Lower Chitpore Road, being rent-free land measuring about 1 cottah, 15 chittaks and 5 square feet with a three-storeyed house and premises erected thereon."

Section 287 provides, amongst other things, that the sale proclamation shall specify as fairly and accurately as possible the property to be sold, any incumbrance to which the property is liable, the amount for the recovery of which the sale is ordered, and "every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property;" and for the purpose of ascertaining the matters so to be specified the Court is empowered to summon and examine witnesses and to order the production of documents.

[267] In this Court the necessary enquiry for ascertaining the particulars required to be stated in proclamations for Sheriff's sales is held by the Registrar, who acts under the powers given him by certain rules of the Court. See rules 382—386, Belchambers' Rules and Orders, page 188.

The purchaser in the present case alleges that the statement in the notification as to the area of the land sold is incorrect; that there is a deficiency in this respect of 4 chittacks and 10 square feet; and that he has been misled by this misstatement, and has thereby induced to offer a higher price than he would otherwise have done.

The question is, whether the purchaser is entitled to adopt this summary procedure for the purpose of obtaining relief.

It is clear that the application is not sanctioned by any provision of the Civil Procedure Code; *Birj Mohun Thakur* v. *Rai Umanath Chowdhry* (1). The only section in the Code which authorises an application to the Court by the purchaser at an execution sale is s. 313, but that authority is limited to the case where the judgment debtor has no *saleable interest* in the property sold.

It was argued that the question raised by this application is a question arising on the execution of a decree, and that therefore the purchaser might come in under s. 244, cl. (*c*) of the Code. But the answer is that the question in this application is not a question arising between the parties to the suit or their representatives. The word "representatives" as used in the section has been held to extend to representatives *in interest*; but then the purchaser in this case has not purchased an interest of the judgment-debtor *which is affected by the decree*, nor can he be said to represent the interest of the judgment-debtor upon this application, because the object of it being to reduce the amount of the purchase money, the interest of the applicant is adverse to the interest of the judgment-debtor. *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (2).

(1) 20 C. 8=19 I.A. 154. (2) 24 C. 62.

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There are many instances where, at the instance of a purchaser [268] at a Registrar's sale, the Court has allowed a reduction of the purchase-money where it appeared that the property sold was actually less in area than it was represented to be in the sale notification; but in one important respect sales by the Registrar stand on a different footing from Sheriff's sales in execution of decrees. Sales in execution of decrees are governed exclusively by the Civil Procedure Code; whereas sales by the Registrar, not being provided for by the Code, are regulated by rules framed by this Court which were passed to supplement the procedure introduced by Act VIII of 1859. These rules provide that for the purpose of sales of immoveable properties directed by the Court, the Registrar is to prepare notifications of sale, abstracts of title, and conditions of sale. One of the usual conditions under which property is sold by the Registrar is that errors and misstatements as to the particulars or description of the property shall not, if capable of compensation, annul the sale; but that compensation shall be allowed therefor. No condition of this kind governed the sale in the present instance; nor could any such condition be made applicable to a Sheriff's sale in this Court without introducing a distinction between these sales and sales in execution by other Courts, which does not seem to be contemplated by the Civil Procedure Code. Formerly, all that was advertised for sale, and was in fact sold in execution of a decree, was the right, title and interest of the judgment-debtor, see s. 249 of Act VIII of 1859; and there was a wide difference between a sale of this character and a sale by the Registrar, where the title to the property and the incumbrances affecting it were fully disclosed in the abstract of title. But this distinction has in substance been swept away by the present Procedure Code and the practice which has grown up thereunder, with the result that an intending purchaser at a Sheriff's sale is now made fully acquainted with all the important particulars of the property he proposes to purchase. As, then, the position of a purchaser at an execution sale is the same in all material respects as that of a purchaser at Registrar's sale, I can see no reason why, where a purchaser can show he has been misled by a misstatement in the sale notification, he should not have the benefit of the same summary remedy, whether it be he has [269] purchased at a Sheriff's sale or a Registrar's sale. But it seems to me this is an amendment of the law which can only be effected by the Legislature.

The result is that the present application must be refused with costs, and I will certify for Counsel.

Attorney for the auction-purchaser: Babu *C. C. Bose.*

Attorneys for the judgment-creditor: Messrs. *G. C. Chunder & Co.*

Attorneys for the judgment-debtor: Messrs. *Kally Nath Mitter* and *Surbadhicary.*

1899 Nov. 30.

ORIGINAL CIVIL.

27 C. 269= 4 C.W.N. 208.

27 C. 269=4 C.W.N. 208.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

RAMDOYAL SEROWGIE *v.* RAMDEO AND ANOTHER.*
[30th November, 1899.]

Practice—Attorney's costs—Summary jurisdiction—Collusive and fraudulent compromise to deprive attorney of his costs.

An attorney applied for an order that the plaintiff and the defendant, or either of them, should pay to him his taxed costs on the ground that they had fraudulently and collusively compromised the suit with the object of depriving him of his costs.

Held, that in cases of this kind, where charges of fraud and collusion are made, it is inconvenient for the Court to dispose of the issues on affidavits alone.

Held, also, that it is not the practice of the Court to interfere summarily between attorneys and their clients as regards claims for costs.

Khetter Kristo Mitter v. *Kally Prosonno Ghose* (1), dissented from.

[Diss., 30 B. 27=6 Bom.L.R. 879 (883); Cons., 7 Bom.L.R. 547.]

THIS was an application, made on summons and adjourned into Court, by Babu N. C. Roy, the attorney for the defendant Luchminarain asking for an order on the plaintiff and the second defendant, or either of them, for payment of the taxed costs due to him by the second defendant Luchminarain. The application asked for the order to be made by the Court in the exercise of its summary jurisdiction.

Mr. *R. Mitter* (Mr. *S. R. Das* with him), for the applicant.—The facts clearly show that there was no *bona fide* settlement, and [270] that the parties colluded together to deprive the attorney of his costs. The Court has power to make an order of this description, if it is shown that the settlement arrived at between the parties was not arrived at solely with the *bona fide* intention of ending the litigation, but also in order to defraud the attorney of his costs.

The case of *Khetter Kristo Mitter* v. *Kally Prosonno Ghose* (1) was referred to.

Mr. *Avetoom*, for the plaintiff.—The plaintiff does not admit that there has been any collusion or any intention on his part to deprive the attorney of his costs due to him by Luchminarain. This is not a case in which the summary jurisdiction of this Court should be exercised. The plaintiff has denied these charges in this affidavit. The application should be dismissed with costs.

ORDER.

SALE, J.—In this case an application is made by an attorney for an order for payment by the plaintiff and the defendants of taxed costs due to him by the second defendant Luchminarain. The application is for an order to be made by this Court in the exercise of its summary jurisdiction.

The facts shortly are these: The plaintiff filed a suit against the defendants to recover Rs. 9,861 on a bond which was alleged to have been executed by both the defendants in favour of the plaintiff. On the 18th May 1899, the plaintiff obtained an *ex parte* decree for the amount claimed, and on the 14th August he attached the stock-in-trade of the shop of Luchminarain, the second defendant, in Akyab. Thereupon Luchminarain

* Original Civil Suit No. 116 of 1899.

(1) 25 C. 887.

came to Calcutta and instructed Babu N. C. Roy, his attorney, to take steps to set aside the decree on the grounds that no service had been effected on him of the summons; and that he was not a partner of Ramdeo and had not executed the bond in question. Certain proceedings were had through the attorney, and subsequently there were negotiations for a settlement of the claim in suit which were partly conducted by the attorney, and eventually a settlement was arrived at by the parties independently of the attorney, and the attorney now claims that the conduct of the plaintiff and the defendants has caused a breach of his lien for the costs due to him, and he also alleges that the settlement was [271] not in fact *bona fide*, but was made by the parties collusively with the object of depriving him of his costs. The claim so far as it rests on the alleged breach of lien, was not pressed, but the applicant relies on facts which it is contended disclosed fraudulent collusion between the plaintiff and the defendants to deprive the attorney of his costs by means of this pretended settlement, which is now set up.

1899 NOV. 30. — ORIGINAL CIVIL. — 27 C. 269 = 4 C.W.N. 208.

As to the alleged settlement, the plaintiff, who alone opposed the the application, filed an affidavit, in which he denied certain of the facts asserted by the applicant, and alleged that there had been a settlement; he denied collusion or any intention on his part to deprive the applicant of the costs due to him by Luchminarain. It is difficult on the materials before me to come to any satisfactory conclusion as to the alleged settlement, or as to the collusion which has been charged.

The conduct of the parties in the proceedings leading up to the alleged settlement is certainly suspicious, but it is impossible on these materials to say what the exact nature of the alleged settlement was, or that it was brought about by the plaintiff collusively with the defendants with the intention of depriving the attorney of his costs.

I think that, even supposing I had the power to exercise the summary jurisdiction of this Court in favour of the applicant, this is not a case in which it ought to be exercised. I ought to say, however, that in my opinion in cases of this kind, where charges of collusion and fraud are made, it is inconvenient that the Court should be asked to dispose of the issues on affidavits, and I feel bound to add that, with all respect to the learned Judge who decided the case of *Khetter Kristo Mitter* v. *Kally Prosonno Ghose* (1), I see no good reason for departing from what has undoubtedly been the rule of this Court, not to interfere summarily between attorneys and their clients as regards claims for costs by the former.

This rule has been laid down and explained in the case of *Domun* v. *Emam Ally* (2). See also the case of *Mahommed* [272] *Zohuruddeen* v. *Mohammed Nooroodddeen* (3). The application is therefore refused, but without costs. The applicant to have liberty to establish his claim, if so advised, by regular suit.

Application refused.

Attorneys for the plaintiff: Messrs. *Manuel & Agurwallah.*
Attorney for the defendant Luchminarain: Babu *N. C. Roy.*

C. E. G.

(1) 25 C. 887. (2) 7 C. 401. (3) 21 C. 85.

1899 AUG. 8.

APPELLATE CIVIL.

27 C. 272.

27 C. 272.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Hill.

BACHU KOER (*Judgment-debtor*) v. GOLAB CHAND (*Decree-holder*).*
[8th August, 1899.]

Jurisdiction—Bengal, N. W. P., and Assam Civil Courts Act (*XII of* 1887), *s.* 13, *cl.* 2 *—Transfer of Property Act* (*IV of* 1882), *ss.* 88, 90*—Sale in execution of mortgage decree—Execution of decree.*

When Subordinate Judges are appointed by the Local Government with jurisdiction over the whole of a distinct, the District Judge is not competent, under s. 13 (2) of the Bengal, N. W. P., and Assam Civil Courts Act, to assign to them different areas *so as to limit or define their respective jurisdictions.*

The Court of such a Subordinate Judge which passed a mortgage decree is therefore the only Court competent to entertain an application for the execution of the decree and to make an order in furtherance thereof, even when the execution is sought by the sale of property other than the mortgaged property, lying within the district, but outside the area assigned to it by the District Judge.

A MORTGAGE decree was obtained by the plaintiff (decree-holder) against the defendant (judgment-debtor) on the 1st April 1897. In execution of that decree, the mortgaged property was sold on the 5th December 1898. The decree was obtained in the Court of the second Subordinate Judge of Sarun. The present application for execution of the said decree was made by the decree-holder in the same Court on the 6th March 1899, praying for the attachment and sale of properties of the judgment-debtor, [273] other than the mortgaged property, for the realisation of the balance of the decretal money. Some of these properties were situated within the districts of Sarun and Champarun, and the rest were situated in other districts.

With regard to the former properties, the judgment-debtor objected that the Court of the second Subordinate Judge had no jurisdiction to execute the decree by the sale of the said properties, inasmuch as they were situated within the *mouzas* which were within the jurisdiction of the Court of the first Subordinate Judge and that of the Additional Subordinate Judge, in accordance with an order of the District Judge, dated the 21st December 1898. The judgment-debtor made also some other objections to the execution proceeding. On the question of jurisdiction, the judgment-debtor relied on *Obhoy Churn Coondo* v. *Golam Ali* (1), *Prem Chand Dey* v. *Mokhoda Debi* (2), *Dakhina Churn Chattopadhya* v. *Bilash Chunder Roy* (3) and *Girindro Chunder Roy* v. *Jarawa Kumari* (4).

The Subordinate Judge overruled the objection, holding that these precedents did not apply, as they did not deal with the provisions of s. 13 of Act XII of 1887, under which the objection was untenable.

The judgment-debtor appealed to the High Court.

Babu *Digamber Chatterjee*, for the appellant.

Dr. *Rash Behary Ghose* and Babu *Golap Chandra Sarkar*, for the respondent.

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* Appeal from Order No. 203 of 1899, against the order of Babu Atal Behari Ghose, Subordinate Judge of Sarun, dated the 3rd of June 1899.

(1) 7 C. 410. (2) 17 C. 699. (3) 18 C. 526. (4) 20 C. 105.

The judgment of the High Court (GHOSE and HILL, JJ.) was as follows :— 1899 AUG. 8.

JUDGMENT.

APPELLATE CIVIL.

27 C. 272.

This is an appeal against an order of the second Subordinate Judge of Sarun granting the application of the decree-holder for attachment and sale of certain properties belonging to the judgment-debtor.

The decree was in a mortgage suit, and it seems to have been made under the combined provisions, so to say, of ss. 88 and 90 of the Transfer of Property Act. The mortgaged properties [274] belonging to the judgment-debtor were, in pursuance of the order of the Court which made the decree, sold on the 5th December 1898. Subsequently an order was made by the District Judge under cl. (2) of s. 13 of the Bengal and N. W. P. and Assam Civil Courts Act (XII of 1887) under which order, as we may assume, that officer distributed amongst the several Subordinate Judges of the district the civil business arising in that district. It is, however, stated (for we have not the order itself before us) that the District Judge assigned over to the Second Subordinate Judge of the district certain parganas, and to another Subordinate Judge certain other parganas lying within the same district, so as to define their respective jurisdictions; but we cannot conceive how such a division of jurisdiction could have been made, having regard to cl. (2) of s. 13 of Act XII of 1887. Subsequently, however, an application was made by the decree-holder, which was in March 1899, for the attachment and sale of certain properties which, as it is now stated before us, are situate within the local limits assigned to another Subordinate Judge not being the Second Subordinate Judge who had made the decree itself; and an objection was thereupon raised that the second Subordinate Judge had no authority in law—in fact, no jurisdiction, to entertain and grant the application in question. The second Subordinate Judge has, upon a consideration of the law and the various rulings on the subject, overruled the objection of the judgment-debtor and granted the application, and the present appeal is by the judgment-debtor.

We think, as already explained, that all that the District Judge could do, with reference to cl. (2) of s. 13 of Act XII of 1887, was to assign to each of the Subordinate Judges such civil business as was cognizable by the Subordinate Judge, subject to any general or special orders of the High Court as he may think fit; and so far as the local limits of the jurisdiction of any particular Subordinate Judge is concerned, it is provided for in cl. (1) of the same section which states: "The Local Government may, by notification in the official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under this Act." There is no question before us that the second Subordinate Judge was appointed with the jurisdiction over the [275] whole district, and therefore we do not see how his jurisdiction could have been limited, in the way as it is stated it was, by the order of the Judge under cl. (2) of s. 13 of Act XII of 1887. On the other hand, the decree having been made by the second Subordinate Judge, he is the only officer who could entertain the application of the decree-holder and make an order in furtherance of the application. The application made by the decree-holder on the present occasion may perhaps be strictly regarded as one under s. 90 of the Transfer of Property Act (1), but, as

(1) [Under the Rules framed by the Calcutta High Court under s. 104 of the Transfer of Property Act, the procedure to be followed in execution of a decree passed under s. 90 of that Act is that prescribed by the Code of Civil Procedure—*Rep.*]

1899 AUG. 8. — APPELLATE CIVIL. — 27 C. 272.

already stated, the decree was made under the combined provisions of ss. 88 and 90 of the Transfer of Property Act, and therefore the application for execution of that decree could only be made to the second Subordinate Judge.

In the view we have expressed we are fortified by the decision of this Court in the case of *Kali Pado Mukerjee* v. *Dino Nath Mukerjee* (1), as also by the observations of this Court in the case of *Jagernath Sahai* v. *Dip Rani Koer* (2). The particular passages from the latter case bearing upon this matter are to be found at pp. 874 and 875 of the report.

For these reasons we think that the order of the Subordinate Judge ought not to be interfered with in this appeal, and the appeal will accordingly be dismissed with costs.

M. N. R. *Appeal dismissed.*

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27 C. 276.

[276] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

KHAIRUNNESSA BIBI AND OTHERS (*Defendants*) *v.* LOKE NATH PAL AND OTHERS (*Plaintiffs*).* [4th August, 1899.]

Specific performance—Contract relating to property of minor—Decree for specific performance.

A decree for specific performance can be given against a minor when the Court finds that it is for the benefit of the minor that the contract should be performed.

Krishnasami v. *Sundarappayar*(3) approved. *Fatima Bibi* v. *Debnath Shah*(4) dissented from.

[F., 26 B. 326 (337)=3 Bom. L.R. 898 (900); Rel., 13 Ind. Cas. 673 (677)=16 C W.N. 297; Appr., 11 C.W.N. 207 (211); R., 34 C. 163 (F.B.)=4 C.L J. 431=11 C.W.N. 34=1 M.L.T. 360; 4 Bom. L.R. 587 (603).]

THIS was a suit to enforce specific performance of a contract for the lease of a tank and certain land. The plaintiff contracted with two *putnidars*, defendants Nos. 6 and 11, for this lease, which these two defendants agreed to give on behalf of themselves and their co-sharers, some of whom were minors. Subsequently the defendants Nos. 1, 2, 3, and 4, well knowing the arrangement which had been made with the plaintiffs, succeeded in inducing certain of the other defendants to give them a lease of the same property after paying them a certain sum for *salami* and a certain sum as a bribe.

The Subordinate Judge, on finding the aforesaid facts, and that the defendants Nos. 6 and 11 had authority to contract on behalf of themselves and the other co-sharers, gave the plaintiffs a decree for specific performance of the lease, with a declaration that the lease granted to the defendants Nos. 1, 2, 3, and 4 was null and void as against the plaintiffs.

From this decision the defendants Nos. 1, 2, 3 and 4 appealed to the High Court.

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* Appeal from Appellate Decree No. 2205 of 1897, against the decree of Babu Atul Chunder Ghose, Subordinate Judge of Birbhoom, dated the 25th of August 1897, reversing the decree of Babu Siti Kanta Mullick, Munsif of Dubrajpur, dated the 3rd of July 1896.

(1) 25 C. 315 (2) 23 C. 871 (874, 875).
(3) 18 M. 415. (4) 20 C. 509.

Moulvi *Sirajul Islam*, and Moulvi *Mahomed Mustafa*, for the appellants.—A decree for specific performance of a contract cannot [277] be given against minors, as they are incapable of contracting under the Contract Act; see *Fatima Bibi* v. *Debnauth Shah* (1).

1899 AUG. 4.

APPELLATE CIVIL.

27 C. 276.

Babu *Nolini Ranjan Chatterjee*, for the respondants.—The case of *Fatima Bibi* v. *Debnauth Shah* was dissented from, by the Madras High Court, in *Krishnasami* v. *Sundarappayyar*(2). Mr. Trevelyan in his book on Minors at page 179 says that specific performance will be granted against an infant if the contract is for his benefit.

The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

JUDGMENT.

This is an appeal from a decision of the Subordinate Judge of Birbhoom, dated the 25th of August 1897, decreeing specific performance of a certain contract.

The facts of the case are that the plaintiffs contracted with two *putnidars*, defendants Nos. 6 and 11, for the lease of a tank and certain land, and that these defendants agreed to give them this lease on behalf of themselves and their co-sharers. Subsequently the defendants Nos. 1 to 4, well knowing of the arrangement which had been made with the plaintiffs, succeeded in inducing certain of the other defendants to give them a lease of the same property after paying them a certain sum for *salami* and a certain sum as a bribe.

Now the Subordinate Judge has given the plaintiffs a decree for specific performance of the lease granted to them, with a declaration that the lease granted to the defendants Nos. 1 to 4 is null and void as against the plaintiffs.

The defendants Nos. 1 to 4 have appealed, and on their behalf it has been urged before us, *first*, that the *putnidars* were not made parties to the appeal in the Court below; *secondly*. that certain of the defendants are minors, and that a decree for specific performance of contract cannot be given against them; and, *thirdly*, that there is no sufficient proof of the authority of the defendants, Nos. 6 and 11, to grant the lease to the plaintiffs on behalf of their co-sharer *putnidars*.

We think, however, that there is no force in any of these contentions. [278] The defendants Nos. 1 to 4 are the only appellants. They are only concerned with the question as to whether their lease should stand or fall. It is perfectly clear their lease cannot stand against the contract which was entered into by the *putnidars* and the plaintiffs. The Subordinate Judge has found as a fact that the defendants Nos. 1 to 4, with full knowledge of the agreement with the plaintiffs, took a lease from the *putnidars*; and therefore it is evident that the lease cannot stand.

Then as to the plea that a decree for specific performance of contract cannot be given against a minor, it is sufficient to refer to the case of *Krishnasami* v. *Sundarappayyar* (2), in which the contrary has been held, and in which the ruling of Mr. Justice Norris, sitting alone in the case of *Fatima Bibi* v. *Debnauth Shah*(1), has been dissented from. We have also been referred to Mr. Justice Trevelyan's work on Minors, page 179, which, we think, is sufficient authority for saying that a decree for specific

(1) 20 C. 508 (509). (2) 18 M. 415.

1899 Aug. 4. — Appellate Civil. — 27 C. 276.

performance of contract can be given against a minor, when it is for his benefit that the contract should be performed, as we think is the case in this instance.

The third point is that the defendants Nos. 6 and 11 had no authority to enter into the contract with the plaintiffs; but there is a finding of fact by the lower Courts to the contrary. It has been found by both Courts that the defendants Nos. 6 and 11 were fully authorized to contract with the plaintiffs, and there is clear evidence to this effect on the record. It is shown that it was the custom of the *putnidars* that, whichever of their co-sharers went to the *mahal*, acted for all of them. There is, therefore, no want of authority on the part of the defendants Nos. 6 and 11, and the *putnidar* defendants, if they had appeared, would have been estopped from raising such a plea.

For these reasons we think that the decision of the Subordinate Judge must be affirmed, and we accordingly affirm it and dismiss this appeal with costs.

Appeal dismissed.

M. R. M.

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27 C. 279=5 C.W.N.362.

[279] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

SIA RAM DAS (*Defendant*) *v.* MOHABIR DAS (MINOR) THROUGH HIS GUARDIAN AND NEXT FRIEND SARJU DAS (*Plaintiff*).*
[2nd August, 1899.]

Receiver—Appointment of Receiver—Civil Procedure Code (Act X of 1882), *s.* 503—*Discretion—Waste.*

The removal of a large amount of property by the defendant, and under circumstances which might fairly give rise to suspicion, during the pendency of the suit in which the question of title to that property would be determined is a sufficiently strong ground for the appointment of a Receiver. *Sidheswari Dabi* v. *Abhoyeswari Dabi* (1), *Chandidat Jha* v. *Padmanand Singh* (2), and *Sham Chand Giri* v. *Bhairam Pandey* (3), referred to.

[Diss., 11 Ind. Cas. 870 (872)=21 M.L.J. 821=10 M.L.T. 490=(1911) 2 M.W.N. 75; R., 32 C. 741 (743); 14 C.W.N. 252=5 Ind. Cas. 27 (29).]

ON the 8th September 1899 the mohuntship of the Asthal Suja *alias* Ramnuggur became vacant by the death of the mohunt Jugarnath Das. Of the two claimants, one was the plaintiff Mohabir Das, who alleged that he was appointed *chela* of the deceased mohunt on the 20th January 1898, and was installed as mohunt on the 2nd of September by Jugarnath Das, about six days before his death. The defendant Sia Ram Das, the other claimant alleged that he was made *chela* on the 16th May 1897, and that he was appointed mohunt twelve days after the death of Jugarnath Das by a *punchayet* consisting of certain neighbouring mohunts and zemindars. The defendant being in possession of the property, an application was made for the appointment of a Receiver at the instance of the plaintiff. A large number of affidavits were put in by both the

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* Appeal from Original Order No. 130 of 1899, against the order of Babu Hari Krishna Chatterjee, Subordinate Judge of Monghyr, dated the 14th of April 1899.

(1) 15 C. 818. (2) 22 C. 459.

(3) Suit No. 179 of 1893. Judgment of the High Court, dated 5th March 1894.

parties, and from those adduced by the plaintiff it appeared that the plaintiff was installed as mohunt on the 2nd of September; that he was the nephew of the last mohunt: that all the three preceding mohunts belonged to the same natural family; and that Jugarnath Das, the last mohunt, was appointed *chela* by his uncle when he was a child. From the report of the Commissioner who was appointed by the Subordinate Judge to make an inventory [280] of the property in question, it appeared that the defendant removed or secreted moneys, securities, bonds, promissory notes and a large quantity of gold and silver ornaments and utensils from the time he took possession of the property. Under these circumstances, the Subordinate Judge made an order directing the appointment of a Receiver.

From this order the defendant appealed to the High Court.

Mr. *J. T. Woodroffe* (with Babu *Joy Gopal Ghose*), for the appellant.—It is not enough for the appointment of a Receiver to assert a right to property; there must be a *prima facie* title and a strong case made out before the Court will interfere; see *Sidheswari Dabi* v. *Abhoyeswari Dabi* (1), and *Chandidat Jha* v. *Padmanand Singh* (2). The appointment of a Receiver will have the effect of turning the defendant out of possession of the property which he now holds; and it would not only deprive him of the management of the property, but would render it difficult for him to procure funds for his defence.

Mr. *Jackson* (with Babu *Umakali Mukerjee*), for the respondent.—The fact that a large amount of property has been wasted under circumstances of suspicion during the pendency of the suit in which the question of title to this property is to be determined, is in itself a sufficient ground for the appointment of a Receiver; see *Sham Chand Giri* v. *Bhairam Pandey* (3). It is shown by the Commissioner's report that the defendant has removed or secreted a large amount of property since he took possession, and he threw obstacles in the way of the Commissioner when he went to make an inventory of the property.

The judgment of the High Court (RAMPINI and PRATT) was as follows :—

JUDGMENT.

This is an appeal against an order of the Subordinate Judge of Monghyr, dated the 14th April 1899, directing the appointment of a Receiver for the custody and preservation of certain property the subject of a suit now pending in his Court.

[281] The suit relates to the mohuntship of the Asthal of Suja *alias* Ramnugger, which became vacant by the death of the former mohunt, Jugarnath Das, who expired on the 8th of September last. Of the two claimants, one is Mohabir Das, the plaintiff, who alleges that he was appointed *chela* of the deceased mohunt on the 20th January 1898, and was installed as mohunt on the 2nd of September, about six days before the death of the old mohunt.

The defendant is Sia Ram Das; and on his behalf it is alleged that he was made *chela* on the 16th May 1897, and that he was appointed mohunt on the 12th day after the death of Jugarnath Dass by a *punchayet* consisting of certain neighbouring mohunts and

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(1) 15 C. 818. (2) 22 C. 459.
(3) Suit No. 179 of 1893. Judgment of the High Court, dated 5th March 1894.

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zemindars. The defendant is now in possession of the property ; and an application for the appointment of a Receiver has been made at the instance of the plaintiff.

In connection with this case several rulings have been cited by the learned counsel on either side.

On behalf of the defendant our attention has been called to the case of *Sidheswari Dabi* v. *Abhoyeswari Dabi* (1), in which it was held that the Court is not justified in appointing a Receiver where a right is asserted to property in the possession of the defendant claiming to hold it under a legal title, unless a strong case in made out. This case was decided by Macpherson and Gordon, JJ., on the 4th June 1888 ; and it has been followed in the case of *Chandidat Jha* v. *Padmanand Singh* (2), in which it has been ruled that the Court will not interfere by appointing a Receiver unless a strong case is made out, and in which it is pointed out that, when an application is made for an injunction, it is sufficient to show that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while in the case of a Receiver a *prima facie* title has to be made out.

These cases have been cited on behalf of the appellant, while on behalf of the respondent the decision of Macpherson, J., sitting on the Original Side of this Court, in *Sham Chand Giri* v. [282] *Bhairam Pandey* (3) has been relied on. This decision is printed at page 139 of this paper book ; and it will be seen that in it the learned Judge seems to be of opinion that it is not necessary that a strong case should be made out to justify the appointment of a Receiver, but that it is sufficient if a fair *prima facie* case is established. Mr. Justice Macpherson further says : "The mere circumstance that such a large amount of property was removed, and under circumstances which might fairly give rise to suspicion, during the pendency of a suit in which the question of title to that property would be determined, is in itself a sufficient ground for the appointment of a Receiver." Mr. Justice Macpherson, therefore, seems in this decision to have taken a less strong view of what is necessary to justify the appointment of a Receiver than in his previous judgment in the case of *Sidheswari Dabi* v. *Abhoyeswari Dabi.* However that may be, we have heard counsel on both sides, and we have had read to us a very large quantity of affidavits put in by the parties ; and we think, after consideration of all these affidavits and of the circumstances of the case, that a sufficiently strong case—we may say a *very* strong case—has been made out by the plaintiff to justify the appointment of a Receiver in this case. Although we are far from wishing to prejudge the case in any way, we certainly think a fair *prima facie* case has been shown to exist on the side of the plaintiff. But, as we have said, we do not wish to prejudge the case ; and we must here point out that no evidence on oath has been given. There are nothing but affidavits to go upon ; and therefore the view we take on these affidavits may entirely be set aside when the witnesses are cross-examined,—as cross-examined they will be,—before the Subordinate Judge at the trial.

Now there is a considerable number of affidavits adduced by the plaintiff—affidavits of most respectable witnesses—to show that he was installed as mohunt upon the 2nd of September last. These are the affidavits of Dr. Rogers, Jotindra Nath Banerjee, Jogendra Nath Banerjee, and others ; and if the affidavits of these gentlemen are entitled

(1) 15 C. 818. (2) 22 C. 459. (3) Suit No. 179 of 1893 dated 5th March 1894.

to implicit belief, there is little doubt that the plaintiff was so appointed on that day. There is also the fact [283] in favour of the plaintiff, namely, that he was the nephew of the last mohunt, and that, all the three preceding mohunts,—Kesho Das, Nursing Das and Jugarnath Das—belonged to the same natural family. Jugarnath Das was the nephew of Nursing Das and was appointed *chela* by his uncle when he was a child. In these circumstances, it appears to us certainly not improbable that Jugarnath Das on his death-bed did select the plaintiff to be his successor.

On the other hand, there are affidavits in support of the allegation that defendant, Sia Ram Das, was made a *chela* by the deceased Jugarnath Das on the 16th of May 1897, although this fact is denied by the plaintiff. But it is admitted that he was installed as mohunt by the *punchayet* on the 12th day after the death of Jugarnath Das. Notwithstanding these two facts, if the former be proved at the trial, it is clear that if the plaintiff succeeds in the course of the suit now pending before the Subordinate Judge in establishing that he was duly installed as mohunt by Jugarnath Das on the 2nd of September, still his claim must prevail over that of Sia Ram Das, that is to say, provided it be proved that the mohunt has power to nominate his successor, as it is contended in this case that he has.

Mr. Woodroffe, who appeared on behalf of the appellant, Sia Ram Dass, urges that it would be very wrong to appoint a Receiver, seeing that this would have the effect of turning his client out of possession of the property which he now holds; and that it would be injurious to him, inasmuch as it would not only deprive him of the management of the property, but would render it difficult for him to procure funds for the prosecution of his defence in the case. We observe, however, that Sia Ram has not been long in possession of the property. He has only recently taken possession. He certainly was not in possession of the property appertaining to the mohuntship before the death of Jugarnath Das, which took place in September 1898; and he obtained possession with the assistance of the police. Therefore, it does not appear to us that he can be said to be in peaceful possession of the property. By the term peaceful possession, we mean possession with the acquiescence of the plaintiff.

[284] Then there is very great reason to believe that since he has taken possession of the property he has committed gross waste with regard to it. It appears that this defendant appeared before the Sub-Divisional Officer of Beguserai on the 9th September 1898, and acknowledged receipt of the property of the mohunt, saying that it was "all safe." Nevertheless, when the Commissioner sent by the Subordinate Judge to make an inventory of the property arrived at the Asthal, in the first place, every obstruction that was possible was put in the way of his doing his duty by this very defendant and his employees; and in the second place, according to the report of the Commissioner, printed at p. 172 of the paper book, it appears that a very large quantity of valuable property has disappeared from the time that this appellant took possession of the property. This property consists of moneys, bonds, promissory notes and other securities, gold and silver ornaments and utensils. And the Commissioner distinctly found that the defendant appeared to have removed or secreted moneys, securities, bonds, promissory notes and a large quantity of silver and gold ornaments and utensils.

In these circumstances, it appears to us that this case comes exactly within the ruling of Mr. Justice Macpherson in the case on the origina

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side, in which he lays down that "the mere circumstance that such a large amount of property was removed, and under circumstances which might fairly give rise to suspicion during the pendency of the suit in which the question of title to that property would be determined, is in itself a sufficient ground for the appointment of a Receiver."

As for the contention of Mr. Woodroffe that the defendant will now be deprived of funds to carry on his defence in this case, we have only to say that the plaintiff is exactly in the same position. But there is too much reason to believe that, owing to the acts of waste which the defendant appears to have committed, he will not be entirely without funds to carry on his case.

Taking the whole of the circumstances of the case into our consideration, we think that this is a case in which a Receiver should be appointed. The property at stake in this case is very large. The immoveable property is estimated to be worth 3 or 4 [285] lakhs of rupees; and the moveable property is said to be worth more than a lakh. The income from the immoveable property is, moreover, said to amount to thirty or forty thousand rupees per annum.

The claimants of the property are mendicants, and apparently possessed of no worldly property whatsoever, and we think that until the rights of the claimants of this property are decided, it is proper that a Receiver should be appointed.

We therefore affirm the order of the Subordinate Judge and dismiss this appeal with costs.

M. R. M. *Appeal dismissed.*

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27 C. 285.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

KARTICK NATH PANDEY AND ANOTHER (*Judgment-debtors*) *v.* JUGGERNATH RAM MARWARI AND OTHERS (*Decree-holders*).*
[2nd August, 1899.]

Limitation—Civil Procedure Code (Act XIV of 1882), s. 230—Decree for sale of mortgaged property, making the defendant personally liable in case of insufficiency—Mortgage decree—Limitation Act (XV of 1879), sch. II, art. 179, cl 4—Step in aid of execution—Application for time—Application to review the order striking off the execution case and to restore it to file.

A decree which directs the realisation of the decretal amount by sale, in the first instance, of the mortgaged properties, and afterwards from the persons and other properties of the defendants, is a mortgage decree and not "a decree for the payment of money" within the meaning of s. 230 of the Civil Procedure Code.

Application for time is not "a step in aid of execution;" but an application for review of an order striking off an execution case and for its restoration to the file is undoubtedly a step in aid of execution within the meaning of the Limitation Act (XV of 1879), sch. II, art. 179. *Ram Charan Bhagat* v. *Sheobarat Rai* (1), and *Fazil Howladar* v. *Krishna Bundhoo Roy* (2), referred to and followed.

Kommachi Kather v. *Pakker* (3), dissented from.

[286] *Fakeer Buksh* v. *Chutte dharee Chowdhry* (4), and *Purmessuree Dossee* v. *Nobin Chunder Tarun* (5), distinguished.

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* Appeal from Original Order No. 204 of 1898, against the Order of Babu Nuffer Chunder Bhutto, Subordinate Judge of Bhagulpore, dated the 2nd of June 1898.

(1) 16 A. 418. (2) 25 C. 580. (3) 20 M. 107.
(4) 14 W.R. 209 = 12 B.L.R. 513, note. (5) 24 W.R. 305.

[**Diss.**, 36 B. 638 = 14 Bom. L R. 765 = 17 Ind. Cas. 30; 28 M. 224 (226); 26 M.L.J. 423 = 15 M.L.T. 305 = (1914) M.W.N. 563 = 23 Ind. Cas. 533; **F.**, 18 Ind. Cas. 455 (457); **R.**, 25 A. 541 (544); 35 C. 1060 = 8 C.L.J. 193; 3 C.L J. 240 = 10 C. W.N. 209 (215); 14 C.L.J. 639 = 16 C.W.N. 132 = 12 Ind. Cas. 70; 16 C.L.J. 404 (410) = 17 C.W.N. 565 = 17 Ind. Cas. 936 (939); 17 C.W.N. 1039 (1042) = 20 Ind. Cas. 829; 19 Ind. Cas. 899 (900); **Expl.**, 31 C. 792 (797).]

THE decree in question was obtained on 26th February 1880 on a mortgage bond. The decree provided that the amount should be paid by sale of the mortgaged properties, and if there were a balance left, the same should be realised from the person and other properties of the judgment-debtors. On the 5th of November 1897 the decree-holder made his last application for execution. The application for execution before this was made on the 26th February 1894. On the 5th of November 1894 the decree-holders applied for time for procuring certain extracts, and on the 6th of November 1894 the Court ordered them to produce the extracts in a day. On the 7th of November 1894 the decree-holder applied for further time, which was refused, and the execution case was struck off. On the 22nd of November 1894 the decree-holders made an application under s. 623 of the Civil Procedure Code for review of the order of the 7th November 1894, and for restoring that execution case to the file; but on the 27th of November 1894 this application was rejected. The main objection of the judgment-debtors in the lower Court was that the execution was barred under s. 230 of the Civil Procedure Code, and also by the Limitation Act.

The Subordinate Judge overruled the plea, holding that the decree being a mortgage decree, s. 230 of the Civil Procedure Code did not apply, and under the Limitation Act, sch. II, art 179, the present application of the 5th of November 1897 was saved by the applications of the 5th, 7th and 22nd of November 1894, which were "steps in aid of execution," and he allowed the application to proceed.

From this decision the judgment-debtor appealed to the High Court.

Dr. *Rash Behary Ghose* (with Babu *Joy Gopal Ghose*), for the appellants: This is a money decree, and the present application, which is beyond the period of 12 years from the date of the original decree, is barred by s. 230 of the Civil Procedure Code; see [287] *Kommachi Kather* v. *Pakker* (1), *Fakeer Buksh* v. *Chutterdharee Chowdhry* (2), and *Parmessuree Dossee* v. *Nobin Chunder Tarun* (3). Further, it is barred by the Limitation Act, as clearly the Subordinate Judge was wrong in holding that the applications of the 5th, 7th and 22nd November 1894 were "steps in aid of execution."

Babu *Saroda Churn Mitter*, Dr. *Ashutosh Mukerjee* and Babu *Ashutosh Mukerjee*, for the respondents, were not called upon.

The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

JUDGMENT.

This is an appeal against the judgment of the Subordinate Judge of Bhagulpore, dated the 2nd of June 1898.

The order of the Subordinate Judge was passed on an application for execution of a decree. The decree in question was dated the 26th February 1830; and it was a consent decree passed in a suit brought upon a mortgage. The decree directs that the decretal money be recovered by sale, in the first instance, of the mortgaged properties which have not

(1) 20 M. 107. (2) 14 W. R. 209. (3) 24 W. R. 305.

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been exempted, and afterwards from the persons and other properties of the defendants.

The judgment-debtors in this case have contended that the decree is barred by limitation.

The Subordinate Judge has overruled this plea, and has ordered that execution should proceed.

[288] Before us two pleas have been urged, namely, *first*, that the present application is barred under the three years' rule laid down in art. 179 of the Limitation Act; and, *secondly*, that it is barred by the 12 years' rule in s. 230 of the Code of Civil Procedure.

The present application was made on the 5th of November 1897, and the previous application on the 26th of February 1894. The Subordinate Judge has, however, held that the present application is saved by the applications made on the 5th, 7th and 27th of November 1894, which, in his opinion, were applications made to take steps in aid of execution.

The pleader for the appellant contends, in the first place, that the Subordinate Judge is wrong in regarding these applications as applications to take steps in aid of execution. We think he is wrong with regard to the applications of the 5th and 7th of November 1894, because these applications were applications for time. which did not further the execution of the decree, but rather retarded it. The application of the 27th of November, however, was an application for review of an order passed upon the 7th, striking off the execution case, and it prays that it be restored to the file. In these circumstances, in our opinion, it is undoubtedly an application to take a step in aid of execution; and therefore the present application seems to us to be saved by the application of the 27th of November.

As to the plea urged by the pleader for the appellant in respect of s. 230 of the Code, we would say that although this, the present application, is no doubt beyond the period of 12 years from the date of original decree, yet that decree appears to us not to be a decree for payment of money or for delivery of property. Therefore execution of this decree is not barred by the rule in s. 230. In support of this view we may cite the cases of *Ram Charan Bhagat* v. *Sheobarat Rai* (1), and *Fazil Howladar* v. *Krishna Bundhoo Roy* (2). There is no doubt a ruling of the Madras High Court to the contrary effect; see [289] the case of *Kommachi Kather* v. *Pakker* (3). But we are, of course, bound to follow the ruling of this Court.

The learned pleader for the appellant has called our attention to the case of *Fakeer Buksh* v. *Chutterdharee Chowdhry* (4), which has been followed in a later case of *Purmessuree Dossee* v. *Nobin Chunder Tarun* (5). We, however, think that these rulings do not apply to the present case. It would seem that in the case *Fakeer Buksh* v. *Chutterdharee Chowdhry* (4), the plaintiff waived his right as mortgagee, sued for the money due on the bond, and got a decree for the money. The present applicant did nothing of the kind. He got on the 26th February 1880 a mortgage decree, and nothing else but a mortgage decree, and he did not get a decree for payment of the balance due on the amount, after realizing what he could from the property until the 5th July 1888.

The pleader for the appellant contends that there was no decree passed then. That may be so; but there appears to have been an order to the effect that the judgment-debtors were bound to pay the balance of

(1) 16 A. 418. (2) 25 C. 580. (3) 20 M. 107.
(4) 14 W. R. 209=12 B. L. R. 513, note. (5) 24 W. R. 305.

the decree, Rs. 60,000. That order seems to have the effect of a decree. But even if that be not so, then it is clear that until that order was passed, the present decree, which it is now sought to execute, was nothing but a mortgage decree. It was not converted into a money decree until that date.

For all these reasons we think that the decree of which execution is sought is not barred by time; and we dismiss this appeal with costs.

M. R. M. *Appeal dismissed.*

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27 C. 290.

[290] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

PREONATH MITTER AND OTHERS (*Defendants*) v. KIRAN CHANDRA ROY AND OTHERS (*Plaintiffs*).* [7th September, 1899.]

Sale for arrears of revenue—Purchaser at a revenue sale—Act XI of 1859, *ss.* 28, 35 *and* 37—"*Entire estate,*" *Meaning of—Effect of Estate being recorded under a distinct number on the rent roll, with a separate revenue assessed upon it—Protected interest.*

When an estate is recorded under a distinct number on the *touzi* or rent-roll of the Collector with a separate revenue assessed upon it, and the sale certificate granted to the auction-purchaser under s. 28 of Act XI of 1859 shows that the estate sold was an entire estate, the mere fact of it comprising undivided shares in certain villages does not prevent its being an entire estate.

Kamal Kumari Chowdhrani v. *Kisan Chunder Roy* (1) referred to.

[R., 12 C.L.J. 336 (344) = 7 Ind. Cas. 821.]

THIS appeal arose out of an action brought by the plaintiffs, certain auction-purchasers, under Act XI of 1859, for a declaration of their right to *khas* possession of certain lands. The allegation of the plaintiffs was that the defendants had no right to the disputed *howla*, inasmuch as they being purchasers of an "entire estate," they were entitled to get the estate free from all encumbrances.

The defence, *inter alia*, was that the lands in question were included in a certain *howla* which was created before the Permanent Settlement, and consequently their *howla* was a "protected interest" within the meaning of s. 37 of Act XI of 1859. The defendants also contended that inasmuch as the estate sold consisted partly, at least, of undivided shares in certain *mouzas*, or villages whereof the remaining shares appertained to other estates, the plaintiffs could not be regarded as purchasers of an "entire estate."

The Subordinate Judge overruled the objections of the defendants and decreed the plaintiffs' suit.

Against this decision the defendants appealed to the High Court.

[291] Babu *Saroda Churn Mitter*, for the appellants.

Babu *Srinath Das*, and Babu *Ram Churn Mitter*, for the respondents.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

JUDGMENT.

MACLEAN, C. J.—This is a suit by certain purchasers under Act XI of 1859, asking in effect for a declaration of their right to *khas* possession

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* Appeal from Original Decree No. 255 of 1896, against the decree of Babu Debendra Lal Shome, Subordinate Judge of Backergunge, dated the 3rd of June 1896.

(1) 2 C.W.N. 229.

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of certain lands marked and described on the map made by the Civil Court Ameen in this suit, as Abbus Mudafat *howla*, for a declaration that the defendants have no rights in such lands, and that, even if they have, they are not valid as against the plaintiffs under the above Act, and for consequential relief. The present appellants are defendants 7 to 9 and 11 to 15, and their defence put shortly is that the lands in question are included in a certain *howla* which was created before the Permanent Settlement, and consequently that their *howla* is a "protected interest" within the meaning of s. 37 of Act XI of 1859. This virtually is the real issue between the parties. The Court below has decided against the present appellants, and hence the present appeal.

There is no question that the plaintiffs purchased the zemindari No. 3847 at a revenue sale on the 26th June 1888, which was confirmed on the 3rd October in that year, and the only question is, whether they are entitled to *khas* possession of the land in dispute, or whether the present appellants have, on the ground I have stated, a "protected interest" in that land.

The various issues and contentions of the two sets of litigants are stated in detail in the judgment appealed against, but few of the arguments apparently addressed to the lower Court have been addressed to us, and I scarcely think any useful object would be attained by my recapitulating in detail those issues and those contentions, but I propose to content myself with referring to the particular points which have been urged before us.

Prima facie the plaintiffs, as purchasers at a revenue sale, are entitled to avoid the undertenure set up by the appellants, unless the latter can bring themselves within some one of the exceptions specified in s. 37, and to my mind the [292] onus, any way in the first instance, is cast upon them of bringing themselves within such exceptions [see *Rash Behari Bosu* v. *Hara Moni Debya* (1)] and the substantial question for our decision is, have they done so?

The suit was instituted in April 1894, and there is no doubt but that the present appellants and their predecessors in title had been in possession of the disputed land for some thirty or forty years before suit, and we are invited to presume from this possession that, even if the documents upon which the appellants rely are not genuine, the *howla* was existent from before the date of the Permanent Settlement.

The appellants, however, did not launch their case in the Court below upon any such presumption, but based it upon a variety of documents, including the actual pottah, creating the *howla*, and which purports to be dated the 2nd June 1773, certain *dakhilas* alleged to have been given by the then zemindar to the *howla* tenureholder between the years 1776 and 1792, and certain deeds alleged to have been executed in 1833 and 1838. If the first of the above documents be genuine, the appellants ought to succeed, but unfortunately the Court below has found against its genuineness, holding that there are indications on the face of it, which clearly show its recent preparation. The learned Judge in the Court below has probably much more experience in these matters than myself. I lay no claim to being an expert in them, but, apart from his reasons, the document in appearance strikes me as almost too venerable, whilst the almost symmetrical tearing of the edges is calculated to excite suspicion. Anyway, I am not prepared to say that the Judge

(1) 15 C. 555.

below was wrong in holding that this document is not genuine, whilst to my mind he gives cogent reasons for discrediting the three deeds of 1833, *viz.*, Exs. A3, B7 and D1, and his adverse and somewbat pungent criticisms on the three deeds of 1838, *viz.*, Exs. A4, B8 and D2 appear to me to be well founded and fatal to the genuineness of those documents. If, then, as the Judge in the Court below has found—and I think rightly—these documents are fabricated and not genuine, no [293] reliance can be safely placed on the *dakhilas* between 1776 and 1792 as genuine documents. No doubt Exs. F1 and F2, the returns of Mr. Scott in 1857, mention this *howla*; but I do not think too much stress can safely be laid upon these returns, for the reason that the zemindari had been then attached, the zemindar was under a cloud, he was not there to test any returns which might be made, and it was just the time when a designing person or persons, with a view to subsequently setting up a *howla* tenure, might get the same entered on the return. But, be this as it may, it only carries us back to 1857, which is a long way from the date of the Permanent Settlement. And it is worthy of comment that the registered deeds of 1865 contain no reference to the previous unregistered documents which I have mentioned above, whilst it is at least open to question, upon the evidence, whether these documents can be regarded as having been produced from the proper custody.

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In my opinion, then, the appellants have failed to prove the genuineness of the pottah of 1773, or the various deeds of 1833 or of 1838, and have equally failed to show an under-tenure existent before the date of the Permanent Settlement, and so protected.

Being of this opinion, it is not necessary to decide whether or not the quinquennial papers referred to in the case are or are not admissible in evidence under s. 35 of the Evidence Act. I consider it very doubtful; but, even if admissible, they do not afford very cogent evidence against the appellants, for they only show that no such *howla* as is now set up is mentioned in those papers.

In regard to the point that the plaintiffs are not purchasers of an "entire" estate within the meaning of s. 37, the learned vakil for the appellant relies upon the statements in paragraphs 2 and 4 of the plaint, and he contends that, as the estate sold consists partly, at least, of undivided shares in certain *mouzahs* or villages whereof the remaining shares appertaining to other estates, the plaintiffs cannot be regarded as purchasers of an entire estate. In our opinion this contention is not sound. The mere fact of the estate sold comprising undivided shares in certain villages does not prevent its being an entire estate, when it is recorded [294] under a distinct number on the *touzi* or rent-roll of the Collector with a separate revenue assessed upon it, and when the sale certificate granted to the auction-purchaser under s. 28 of Act XI of 1859 (Ex. 7) shows that the estate sold was an entire estate. The view we take is in accordance with that taken by this Court in *Kamal Kumari Chowdhrani* v. *Kiran Chandra Roy* (1).

Then it is said that, having regard to the possession of the appellants from the year 1857, the burden of proof, originally upon them, to make out their protected interest is shifted, and that, in the absence of any evidence adduced by the plaintiffs to the contrary, the Court ought to presume that the *howla* existed before the Pemanent Settlement, and reliance is placed on the Privy Council case of *Forbes* v. *Meer Mahomed Hossein* (2).

(1) 2 C. W. N. 229.

(2) 20 W. R. 44 (45).

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and the recent case of *Nityanund Roy* v. *Banshi Chandra Bhuiyan* (1). I do not think the possession here is long enough to raise any such presumption or to shift the onus of proof, least of all when the appellants have not launched their case upon any such presumption, but upon a series of documents which are found not genuine. In the case of *Nityanund Roy* v. *Banshi Chandra Bhuiyan* (1), it was found that the *taluq* had been in existence and in possession of the defendants from the year 1798, that is, only five years after the date of the Permanent Settlement. Here the possession only goes back thirty years or so before the plaintiffs' purchase, and may reasonably be attributed to some source of title other than the creation of a tenure before the Permanent Settlement.

Agreeing then in the conclusion of the Court below, we think the appeal fails, and must be dismissed with costs.

BANERJEE, J.— I concur.

S. C. G. *Appeal dismissed.*

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27 C. 295=4 C.W.N. 129.

[295] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

QUEEN-EMPRESS *v.* JADUB DAS.* [20th June, 1899.]

Evidence—Evidence in Criminal Case—Criminal Procedure Code (Act V of 1898), *ss.* 161, 164, 288 *and* 307—*Impropriety of taking down statements of persons immediately before their arrest—Impropriety of recording statements of witnesses with a view to fix them to those statements—Confession retracted—Evidence of witnesses retracted—Corroboration—Deposition before committing magistrate read under s.* 288, *Criminal Procedure Code—Trial by jury—Duty of Judge—Reference to High Court.*

Where there is evidence in the hands of a police officer upon which he is bound to arrest a person, it is improper for him to obtain a statement from that person professedly under s. 161 of the Criminal Procedure Code and reduce it to writing; and by virtue of s. 25 of the Evidence Act such statement is inadmissible in evidence.

It is also improper for a police officer to send a person practically under custody, who is in the position of a witness, to have his statement recorded by a Magistrate under s. 164 of the Criminal Procedure Code, with the view of fixing him to that statement at the time when judicial proceedings are subsequently taken. The voluntary character of such a statement cannot but be doubted, and when retracted in the Court of Sessions, the Judge should not bring the statement on to the record under s. 288 of the Criminal Procedure Code without making proper inquiry.

It is not safe to convict an accused person on his retracted confession standing by itself uncorroborated, or on the statements of witnesses brought in under s. 288 of the Criminal Procedure Code without independent corroborating testimony; nor can these two be joined together and held as mutually corroborating each other so as to justify a conviction based on them.

Queen v. *Amanulla* (2), *Queen Empress* v. *Rangi* (3), and *Queen Empress* v. *Bharmappa* (4) referred to and approved.

In making a reference under s. 307 of the Code of Criminal Procedure the Sessions Judge is limited to the evidence at the trial which was before the jury.

[F., 7 C.W.N. 345 (349); 15 M.C.C.R. 1 (Cr.); R., 13 C.P.L.R. 107 (110); 13 Cr. L.J. 352 (417)=14 Ind. Cas. 896 (961)=12 M.L.T. 1=(1912) M.W.N. 549; 1 L.B.R.

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* Criminal Reference No. 11 of 1899, made by L. Palit, Esq., Sessions Judge of Jessore, dated the 13th of May 1899.

(1) 3 C. W. N. 341.
(2) 12 B.L.R. Ap. 15=21 W.R. Cr. 49.
(3) 10 M. 295.
(4) 12 M. 123.

238 (246); 3 P.W.R. 1907 (Cr.); 264 P.L.R. 1914=30 P.R. 1914 (Cr.)=15 Cr. L.J. 626=25 Ind. Cas. 634.]

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[296] REFERENCE under s. 307 of Criminal Procedure Code by the Sessions Judge of Jessore. The facts of the case appear from the following portions of the letter of reference:—

"Three persons—Jadub Das, Rai Charan Das and Mangal Das—were tried for the murder of one Jogeswar Das. The trial was by jury. The jury returned a verdict of "not guilty" in respect of all the three accused. In respect of Rai Charan Das and Mangal Das I accepted the verdict of the jury, but as regards Jadub Das I think it necessary for the ends of justice to refer the case under s. 307 of the Criminal Procedure Code.

"The case for the prosecution may be briefly stated as follows: On the 1st of January last, Jogeswar Das, a boy, said by his father to be about fourteen years of age, and by the Assistant Surgeon who performed the *post mortem* examination to be about 17 years of age, went out in the evening and did not return home. His father searched for him the next day, but in vain. On the morning of the 3rd January his dead body was found in a field, and the boy's father went and lodged information at the police station. The police came and arrested Jadub Das on suspicion and sent him up. Then, in the course of the investigation, evidence was obtained from Jadub's mother, grand-mother and wife, which led to the arrest of Rai Charan and Mangal. In the committing Magistrate's Court Jadub made a statement in the nature of a confession, and giving the same version of the occurrence as that given by his mother.

"All the three women witnesses and the prisoner Jadub have retracted the statements made by them in the committing Magistrate's Court. The depositions of these three witnesses and the examination of Jadub in the committing Magistrate's Court have been put in. Without these there is no evidence at all against any of the prisoners.

"It has been contended that the mere fact that the whole of the evidence against the accused consists of evidence given in the committing Magistrate's Court and of a retracted confession is sufficient to entitle the accused to an acquittal.

"I am aware that there are some decisions which apparently support the above view. In *Queen* v. *Amanulla* (1), Phear, J. expressed a strong view that the law does not authorize the founding of a conviction upon evidence given entirely in another Court. But it appears to me that the true interpretation of the remarks of Phear aud Morris, JJ. in that case is that, when there is nothing before the Court to enable it to arrive at the truth except contradictory statements by the same witnesses, then it is not proper to base a conviction upon any one of two such sets of contradictory statements. If from the evidence of other witnesses, or from the circumstances of the case, the Court is enabled to conclude that the evidence given in the committing Magistrate's Court can be acted upon, then I apprehend that the mere fact that [297] all the witnesses have gone back on their first statements will not stand in the way of a conviction. In the case of *In the matter of Dham Mundul* (2) a conviction based entirely on evidence given in the committing Magistrate's Court was upheld.

"I therefore proceed to consider whether the evidence in this case is of such a nature as to justify a conviction."

(1) 12 B. L. R. App. 15=21 W. R. Cr. 49. (2) 6 C.L.R. 53.

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After discussing the evidence as given before the committing Magistrate, the Sessions Judge concluded his letter of reference as follows :—

"The jury have no doubt returned a unanimous verdict of acquittal. In a case of this kind, however, the verdict of a jury does not stand on the same footing as in a case where they are called upon to decide on evidence given before them. In this case the Court has to act more as an appellate Court, the evidence having been practically entirely given in another Court, and the decision in a case of this kind must rest on an elaborate process of reasoning. Having regard to the nature of the case, I am not surprised that the jury should have returned the verdict they did. After giving the case my best consideration, I feel convinced that Jadub is guilty of the murder of the unfortunate boy. The murder was an atrocious one, and the evidence that the police produced was the best that they, after an honest and careful investigation, could produce. The witnesses being so closely related to the prisoner, it was only to be expected that they should retract their evidence as soon as they realized that the evidence would mean Jadub's conviction. But in spite of all that, it seems to me that Jadub's guilt has been amply brought home to him.

"Therefore I think it necessary, for the ends of justice, to refer the case under s. 307 of the Criminal Procedure Code for the orders of the Hon'ble High Court."

The Officiating Deputy Legal Remembrancer (Mr. *Abdur Rahim*), for the Crown.

Babu *Jyoti Prasad Sarbadhicary*, and Babu *Sarat Chunder Roy Chowdry*, for the accused.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

JUDGMENT.

Three persons—Jadub Das, Mangal Das, and Rai Charan Das—were tried in the Sessions Court of Jessore on a charge of murder by causing the death of one Jogeswar Das by strangling him, and in the Sessions Court a further charge of abetment under s. 114 of the Indian Penal Code was added by the Sessions Judge against Jadub Das. The jury returned an unanimous [298] verdict of acquittal, and the Sessions Judge has referred the case to us under s. 307 of the Code of Criminal Procedure in respect only of Jadub Das. He has accepted the verdict of acquittal as regards the other two accused.

Dwarik Das is the father of the deceased Jogeswar, and he states that his son left his house at about two dandas of the evening of the 1st January, and has never since been seen alive. He made many inquiries regarding him during that night and the following day, but could learn nothing until, on the morning of the 3rd January, he was told, by one Biswanath that his son's body was lying in a field. He went there and found his son dead ; Jadub Das, the prisoner, his mother and grandmother, who are both witnesses, being present "lamenting." He also says that "Pitiraj Chowkidar went there at that time," but this man has not been examined as a witness. He then went and gave information to the police station, distant about six miles, charging Jadub Das with the crime, and mentioning Biswanath and Mangal Das as being concerned in it. It may here be observed that nothing was then said of the presence of Jadub Das and the female witnesses when he first found the body. The Police

Sub-Inspector went on the following day, that is on the afternoon of the 4th, and then commenced his investigation.

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Now the first thing naturally would be to proceed against Jadub Das, who was the person accused by Dwarik on the ground that he bore ill-will towards the deceased. The Sub-Inspector states that Jadub was not at home, and that he was brought by a constable at about 4-30 in the afternoon. The constable, who is said to have arrested him, has not, however, been examined, and therefore there is nothing to show that Jadub Das was in any way evading arrest. Having got Jadub Das before him, it would be expected that the Sub-Inspector would arrest him ; but he says that he did not do so. He would have us believe that he considered that he had no sufficient ground for arresting him. That is indeed the reason mentioned, and accepted by the learned Sessions Judge in a part of his reference to us. On the contrary, the Sub-Inspector proceeded to record a statement in writing of Jadub Das professedly under s.161 of the Code of Crimnal Procedure, and then immediately afterwards he [299] arrested him and sent him in to the Magistrate without any delay. In that statement it may be mentioned that Jadub Das denied all knowledge of the murder, and therefore there was nothing before the Sub-Inspector, in addition to the accusation of Dwarik Das, which was already before him, to induce him to arrest Jadub Das. We think it was a very improper step on the part of the Sub-Inspector to take any statement in writing from Jadub Das. He must have known that that statement was being taken preliminary to his arrest, and that it could be so taken only for the purpose of obtaining evidence. We observe that a similar course was also taken in regard to another man—Rai Charan Das. This will be presently referred to. Jadub Das was accordingly sent in to the Magistrate on the evening of the 4th. Now, with suspicion on some foundation against Jadub Das, it would naturally follow that the police should make a further and close inquiry from the inmates of his house. The Sub-Inspector, however, would have us believe that he did not think it necessary to make any inquiry beyond a mere cursory inquiry, and that he directed his inquiries elsewhere. He states, however, that he examined the mother of Jadub Das on the evening of the 6th, and that the next morning she repeated the same statement in the presence of about fifty people, the statement then made being one incriminating her son Jadub Das and the two other prisoners, Mangal and Rai Charan. Having this statement before him, the Sub-Inspector did not attempt to expedite the completion of the investigation, or to arrest Mangal and Rai Charan. On the 10th January he sent in the mother of Jadub Das to be examined by the Magistrate under s. 164 of the Code of Criminal Procedure, and the reason he gives for requesting this to be done was that she was the only eye-witness available, and it was very likely that she would be gained over by the accused if she was not examined at once. The Sub-Divisional Magistrate accordingly recorded her statement as that of a witness, and in so doing, he added a note that that statement was taken in the presence of Jadub Das and three others who had an opportunity of cross-examining the witnesses, but had not done so. In that statement, no doubt, this woman describes that the murder was committed by the prisoners. We think it was never intended [300] that s. 164 should be applied to such a purpose. It was not intended to enable the police to obtain an incriminating statement by some person, and as it were to put a seal on that statement by sending in that person to a Magistrate, practically under custody, to be examined before the judicial inquiry or trial, and therefore compromised in his

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evidence when judicial proceedings are regularly taken. We may also observe that the law does not require that in the case of a witness so examined there should be a certificate after proper inquiry that the statement has been voluntarily made, and the law also expressly protects a witness from unnecessary restraint or inconvenience at the hands of the police. Here this woman was sent by the police, and therefore presumedly under some restraint, and there was consequently much risk that her statement would be given under some pressure and not voluntarily. In this case we can find no reason why the Sub-Inspector should not have sent up the entire case at that time. If he had done so, this woman could have attended as any other witness. There was, moreover, no sufficient reason why he should have hurriedly sent up this woman alone to be examined before the completion of the investigation.

We have already stated that a statement of a witness so obtained always raises a suspicion that it has not been voluntarily made. Here we have the fact that, although it was repeated a few days later before the Magistrate, it was retracted at the Sessions trial, and an explanation, which was not *prima facie* unfounded or impossible, given to show that the statement had been improperly obtained. With this before him, the Sessions Judge was, in our opinion, bound to make some inquiry. Instead of doing so he at once proceeded under s. 288 of the Code of Criminal Procedure to bring on the record as evidence at the Sessions trial the two statements made by this witness, and it may be added the Sessions Judge never made any inquiry at all into this matter, although the same story was repeated by Jadub Das when he accounted for the manner by which his confession had been obtained in the Magistrate's Court.

The inquiry before the Magistrate commenced on the 14th, and first of all Dwarik Das was examined, then the Sub-Inspectors **[301]** and then the mother of the accused, Jadub Das, who had already made a statement on the 10th. Now if the statement that she made on the 10th was a part of the inquiry before the Magistrate and a commencement of it, it is impossible to conceive for what useful purpose the same statement should have been again recorded. The fact that the Magistrate in recording the first statement thought proper to certify that it was made in the presence of Jadub Das and the other accused, and that they had an opportunity to cross-examine, but did not do so, would seem to show that the Magistrate considered that he was making that examination as part of a judicial inquiry. She then repeated almost in the same words what she had already said on the 10th. There was also the evidence of the grandmother of Jadub, and of his wife which, in some respects, corroborated the evidence given by the mother. At the close of the evidence for the prosecution in the Magistrate's Court when the accused were examined, Jadub Das proceeded to make a statement in the nature of a confession, and generally in the same terms as the statement already given by his mother as a witness. At the Sessions trial, not only did these three women deny their previous statements, but Jadub Das also denied the confession that he had made. The Sessions Judge nevertheless proceeded to place on the record, under s. 288 of the Code of Criminal Procedure, the evidence given by these three women before the committing Magistrate, as well as the statement of the mother previously recorded under s. 164 on the 10th.

In addition to these statements, there is the evidence of a blind man, of which it is necessary only to say that in the Sessions Court he has

embellished his evidence given before the Magistrate very considerably, so as to make it press more severely on the accused. No doubt the Sessions Judge has placed on the record the previous statement made by this witness before the Magistrate; but even if we were to accept that statement as true in preference to his later deposition, we should still not regard it as of any value whatsoever in this case. The remaining evidence consists of the evidence of the Sub-Inspector and the constable, and also of the medical witnesses. The evidence of the Sub-Inspector is, we think, not at all material in this case, except in so far as it shows that he has not fairly conducted the investigation.

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[302] It has been already mentioned that the statement obtained by the police from the mother of Jadub Das is said to have incriminated Rai Charan, but that instead of arresting Rai Charan, the Inspector examined him as a witness, reducing his statement to writing, and that he then arrested Rai Charan. We have already expressed our strong disapproval of this proceeding. To all intents and purposes it was the obtaining by the police of a statement from an accused person and reducing it to writing, and this was done at a time when the police officer well knew that there was evidence before him on which he was bound to arrest Rai Charan. The impropriety of such proceedings is aggravated by the course taken by the Sessions Judge. He examined the Sub-Inspector in regard to that statement, and he thus admitted it as evidence on the trial. This statement cannot be regarded otherwise than as a confession made by Rai Charan to the Sub-Inspector. If it be so regarded, it was clearly inadmissible under s. 25 of the Evidence Act. If, on the other hand, it was to be used as evidence against the other prisoners, it was manifestly inadmissible. It was therefore very improper on the part of the Sessions Judge himself to introduce this statement so as to place it before the jury, and by so doing he must have seriously prejudiced, not only Rai Charan, but the other prisoners who are mentioned in that statement as taking a prominent part in the murder.

The Sessions Judge has, moreover, in this manner, acted in disregard of the statutory rule laid down in s. 162 of the Code of Criminal Procedure, which declares that "no statement made to a police officer in the course of an investigation shall, if taken in writing, be used as evidence." No doubt Rai Charan, it is said, was not under arrest when he made that statement; but there was ample information with the police on which he might and should have been arrested.

It is impossible to avoid believing that Rai Charan was practically under arrest at that time, and that there has been an endeavour made by the police, which has been successful, to get this statement admitted as evidence when it was clearly inadmissible.

Lastly, we have the medical evidence. The evidence of the [303] medical officer who conducted the *post mortem* is not very explicit as regards the actual cause of death, and we think it is to be regretted that, under such circumstances, the Sessions Judge should not have examined the medical witness himself at the Sessions trial. But taking the evidence of this officer as recorded by the Magistrate, the Sessions Judge proceeded to examine the Civil Surgeon as an expert, and he did not examine this witness on the points which were in evidence on the statement of the officer who conducted the *post mortem* examination, but he took his statement on matters entered in the *post mortem* report. Now that report is not admissible as evidence except to contradict the officer who made it. It may, however, be used by that officer when under examination for the

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purpose of refreshing his memory. We have no particular fault to find with the summing up by the Sessions Judge. The jury unanimously returned a verdict of acquittal, and the reference, as has already been stated, is only in regard to Jadub Das. Now, in the first place, we observe that in making this reference the Sessions Judge says: "Having regard to the nature of the case, I am not surprised that the jury should have returned the verdict they did;" and he adds apparently as a reason for his refusing to accept that verdict that the " decision in a case of this kind must rest on an elaborate process of reasoning." But there was no apparent excuse for the Sessions Judge not laying before the jury the same elaborate process of reasoning as he thought proper to lay before us in making this reference to us, supposing, however—and we lay special stress on this—that the manner in which he has treated the case on this reference is legitimate and proper. We give the Judge full credit for being impressed with the guilt of the accused and doing his best to place the case before us in a proper manner, but having done this, we must express our surprise at the terms in which he has placed his reference before us. It is not a document which should emanate from any judicial officer. It is a piece *of special pleading* with the chief object of exonerating the police from any suspicion in the proceedings.

The Sessions Judge does not rely on the evidence as presented to the jury, but he has throughout relied on the police proceedings, which could not have been placed before the jury. If he desired to show that the proceedings of the police were regular [304] and above suspicion, he should obviously have obtained such evidence by examining police officers as witnesses so as to explain such proceedings. The objections which must be taken to these proceedings were patent from the first. The Sessions Judge should therefore have examined the Inspector at once on all these points, and he should also have required evidence regarding the custody of Jadub Das in the jail with special reference to the meeting which is said to have taken place between the female witnesses and the prisoner Jadub Das, and the inducement then said to have been held out. The Sessions Judge has really asked us to consider and determine their case, not only as he himself admits on an elaborate process of reasoning which he never laid before the jury, but on matters which were not admissible in evidence, and were not therefore before the jury, and he has then asked us to hold that the verdict of the jury is erroneous on grounds which were never laid before them for their consideration. Obviously, in a reference under s. 307, it is our duty to consider whether the verdict of the jury is erroneous or perverse on the case presented to them at the trial. Moreover the course adopted by the Sessions Judge would be most unfair to those under trial, for they would not have had an opportunity of meeting and rebutting what is now to be used against them. The Sessions Judge throughout seems to have considered that the Inspector was not only attacked, but as if he were under trial. It was rather the duty of the Sessions Judge to consider how far the evidence could be fairly used against those who were really under trial. He has not approached a consideration of the evidence by satisfying himself how far the reasons given for discrediting the evidence in consequence of alleged irregularities or misconduct of the police have any substantial foundation, but he has rather applied himself to exonerate the police. As an instance of this, we would mention that, when the mother of Jadub Das denied the statements that she had made to the Magistrate, and stated how they had been improperly obtained by the police, the Sessions Judge,

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without any inquiry as to the truth of this allegation, forthwith brought on the record under s. 288 of the Code of Criminal Procedure, those statements to be treated as evidence at the trial as if this accusation had no foundation; and it may be added that it is on this statement that the conviction of Jadub Das, which the Sessions Judge [305] recommends, must principally depend. The Sessions Judge has referred to, and relied on, police diaries. Now the police diaries never could be placed before the jury. They are only useful as is pointed out by the Code of Criminal Procedure, s. 172, not as evidence, but to aid a Court on the trial, so as to enable it to make a thorough inquiry on all material points by eliciting in the examination of the witnesses—and especially of police witnesses—the real facts of the case. We are surprised to find that the Sessions Judge has not seen any impropriety on the part of the Sub-Inspector in examining Jadub Das and Rai Charan, in recording their statements immediately before their arrest at a time when the Sub-Inspector must have known that he was about to arrest them. We cannot, therefore, agree with the Sessions Judge that in this respect the Sub-Inspector's conduct of the investigation appears to have been perfectly proper and straightforward without affording any ground for even a suggestion to the contrary.

Then, again, when we come to the proceedings in respect to the mother of Jadub Das, we find that the Sessions Judge thinks that they were not at all open to comment. It seems to us, however, that there are serious reasons for disapproving of them. Here we have a statement said to have been made on the 6th, and it is followed by a delay in completing the investigation, which is not explained, and which is also *prima facie* unaccountable. This was followed up by the Sub-Inspector sending in this woman to have her examined on the 10th by the Magistrate under s. 164 of the Code of Criminal Procedure. The Sessions Judge apparently overlooked this delay, and we can find no explanation why this woman, who is said to have first made this statement to the police on the 6th and to have repeated it to the villagers on the 7th, should have been kept until the 10th, if it was necessary to have her statement taken by the Magistrate. The case was really completed when the statement had been obtained from the mother of Jadub Das and the two other women of the house, and there was really no reason at all why there should have been any delay in concluding the investigation and sending in the final report with all the evidence obtainable. We are consequently quite unable to take the view expressed [306] by the Sessions Judge of the conduct of the police in this investigation.

It remains, however, to consider the order which, on the evidence before us, we should make on this reference and on the evidence at the Sessions trial.

The sole fact upon which we can rely is that Jogeswar's body was found in a state from which the medical evidence shows it may be concluded that death was caused by violent means about 36 hours before the discovery of the body. The other evidence that there is on the record is the evidence of the three women recorded by the committing Magistrate and denied by them in the Court of Sessions, but placed on the record by the Sessions Judge and laid before the jury under s. 288 of the Code of Criminal Procedure. Now the manner in which such evidence should be treated has long ago been settled by the decisions of this Court, and it has been laid down that, unless there is something to show the truth of the former statement, it should not be preferred to the statement made

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subsequently in the Sessions Court, that is to say, that there should be something to corroborate such a statement on some material point. The case of *Queen* v. *Amanulla* (1) is the leading case on this subject. What reason, it may be asked, is there to suppose that the statements made before the Magistrate by these witnesses were true? The only corroboration that there is is afforded by the statement made by Jadub Das at the conclusion of the record of the evidence for the prosecution by the Magistrate, and that statement is in the nature of a confessional statement. But that statement was also repudiated in the Sessions Court, and it has been frequently held by this Court that it is not safe to rely upon a statement so made, unless it is corroborated by some evidence so as to show that it is true. Now, what evidence is there that it is true? There are the statements of these witnesses, but the statements of these witnesses should not be accepted without some corroboration. Here then we have two sets of evidence, neither of which can alone be accepted without corroboration, and which cannot therefore each in turn be taken to corroborate the other. Reference may be made to the judgment **[307]** of Kernan, J., in *Queen-Empress* v. *Rangi* (3) and *Queen-Empress* v. *Bharmappa* (2). The last case especially expresses the opinion that we entertain, that evidence brought in under s. 288 cannot be accepted as proper corroboration of a confession made to a Magistrate and retracted at the Sessions trial. There is, moreover, an additional reason for refusing to act on such evidence, for there is very good ground for supposing that the confession of Jadub Das made before the Magistrate on the 14th January was not fairly obtained, and that it therefore was not a voluntary statement. In the Sessions Court the mother states that she and other female relatives of Jadub Das were, during the proceedings before the Magistrate, brought into his presence. Jadub Das makes a similar statement. There has been no attempt made to contradict this. With what object this was done it is not difficult to understand. It must have been for the express purpose of inducing Jadub Das to confess, and that is what both Jadub Das and his mother state happened, with the result that the mother repeated her previous statement, and Jadub Das made a similar statement as the best course suggested to them of obtaining a result most favourable to him. No doubt there is no evidence to show this; but the evidence of the woman is uncontradicted. However that may be, as has been already pointed out, we think it would not be safe to convict the accused Jadub Das on the evidence of the confession standing by itself, or on the evidence of three witnesses standing alone, and we do not think that these two sets of evidence can be joined together and held as mutually corroborating each other, so as to justify our acting on such evidence.

It may be that there are some reasons for suspecting that Jadub Das has committed this murder, but we can certainly not convict him on the evidence before us, for we cannot rely with any confidence on any part of it.

In conclusion, it is only necessary to bring to the notice of the Sessions Judge that he has entirely misconceived his duty in this reference under s. 307 of the Code of Criminal Procedure. He seems to think that he was placed in a different position from the jury, or from that which he himself occupied during the trial. **[308]** He says that in a case of this kind "the verdict of the jury does not stand on the same footing as in a

(1) 12 B.L.R.App. 15=21 W. R. Cr. 49. (2) 10 M. 295.
(3) 12 M. 123.

case where they are called upon to decide on evidence given before them. In this case the Court has to act more as an appellate Court, the evidence having been practically entirely given in another Court." We cannot at all concur in this observation. The Judge should recollect that in a trial held by him, he is exactly in the same position as the jury in dealing with the evidence properly given before him, and that he is bound to confine his attention solely to that evidence. That is the rule which should invariably guide him in making a reference to this Court under s. 307 of the Code of Criminal Procedure. The result that we come to, therefore, is that, in our opinion, Jadub Das should be acquitted, and we accordingly direct his release.

1899 JUNE 20.

CRIMINAL REFERENCE.

27 C. 295 = 4 C.W.N 129.

S. C. B.

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27 C. 308.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

BEJOY CHAND MAHATAB, MINOR, BY HIS NEXT FRIEND RAJA BUN BEHARI KAPUR (*Defendant No. 1*) *v.* AMRITA LAL MUKERJEE (*Plaintiff*) AND OTHERS (*Defendants Nos. 2 and 3*).*
[22nd August, 1899.]

Sale for arrears of rent—Regulation (VIII of 1819), s. 8, cls. (2) and (14)—Formalities prescribed in that section for due publication of the notice of sale—Rights of auction purchaser on sale being set aside—Interest on purchase money.

In cases where the due publication of the sale notice is in controversy, it is incumbent upon the landlord to show that the formalities prescribed by s. 8 of Reg. VIII of 1819 have been complied with.

Maharajah of Burdwan v. *Tarasundari Debi* (1), and *Maharani of Burdwan* v. *Krishna Kamini Dasi* (2), referred to.

[309] *Sona Beebee* v. *Lallchand Chowdhry* (3), explained.

Under s. 14 of Reg. VIII of 1819, when a *putni* sale is set aside, the auction-purchaser is entitled to get back the purchase money with interest.

[R., 13 C.L.J. 404 = 16 C.W.N. 805 (808) = 10 Ind. Cas. 90.]

THESE appeals arose out of an action brought by the plaintiff for the setting aside of a *putni* sale on the ground of the notice under s. 8 of Reg. VIII of 1819 not being duly published. The allegation of the plaintiff was that he had an eight-anna share in a *putni* tenure, and defendant No. 3 was entitled to the other eight annas; that they defaulted in payment of the *putni rent*, whereupon the landlord, defendant No. 1, having taken proceedings under Reg. VIII of 1819, sold the tenure, which was purchased by defendant No. 2; that the notice mentioned in s. 8 of the Regulation was not duly published, and the sale was therefore bad in law.

The Subordinate Judge upon the evidence found that the formalities prescribed in s. 8 of the Regulation were not observed, and set aside the sale, making the defendants Nos. 1 and 2 jointly liable for costs, and directed refund of the purchase-money without interest.

Against this decision the defendants appealed to the High Court.

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* Appeal from Original Decrees Nos. 332, 329 and 348 of 1897, against the decree of Babu Kali Prosunno Mukerjee, Subordinate Judge of Hooghly, dated the 23rd of July 1897.

(1) 9 C. 619 = 10 I.A. 19. (2) 14 C. 365 = 14 I.A. 20. (3) 9 W.R. 242.

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Babu *Ram Churn Mitter*, for the appellant in appeal No. 332, and for the respondent in Nos. 329 and 348.

Babu *Golap Chunder Sarkar*, for the appellant in appeal No. 329, and for the respondent in No. 332.

Babu *Nilmadhub Bose* and Babu *Shib Chunder Palit*, for the appellant in No. 348.

Babu *Shib Chunder Palit*, for the respondent in No. 332.

Babu *Shiva Prasanna Bhattacharjee*, for the respondent in No. 348.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.):—

JUDGMENTS.

MACLEAN, C. J.—This is an appeal from the decision of the third Subordinate Judge of Hooghly. The case is of this nature. [310] The plaintiff has an eight-anna share in a certain *putni* tenure, and the defendant No. 3, who is a minor, is entitled to the other eight annas share. They defaulted in the payment of the *putni* rent, and the zemindar took proceedings under Reg. VIII of 1819 to have the *putni* tenure sold. The tenure was put up for sale, and was sold on the 23rd November 1896, and the defendant No. 2 was the purchaser under that sale. The defendant No. 1 is the zemindar, the Maharajah of Burdwan, a minor, whose estate is under the Court of Wards. The sole question we have to decide is whether the sale was duly published in accordance with the requirements of paragraph 2 of s. 8 of the above Regulation, the suit being one, as I said before, to have the sale of the *putni* set aside on the ground that the requirements of that Regulation were not duly complied with.

The Judge in the Court below, on this issue, came to this conclusion: "I have carefully considered that evidence and am inclined to think that the notice was not duly published." That is not a very strong or confident expression of opinion; but later on he says: "The evidence is not such as to warrant a finding that there was due publication of the sale notice at the *putnidar's* cutcherry." He found, therefore, against the validity of the sale, and in the plaintiff's favour.

The evidence in support of the zemindar's case has been read to us. There is the evidence of the gomashta of defendant No. 3, of the peon who served, and, as he said, stuck up the notice and duly published it, and of a chowkidar of the village, and that evidence is corroborated by a postcard, which the peon sent on the same day from the village, where he had, as he says, published the notice, to the cutcherry of the zemindar at Burdwan.

I ought to mention that, although there were the two co-sharers of this *putni* tenure, there was but one cutcherry for the two, *viz.*, the cutcherry where the notice is alleged to have been stuck up. These witnesses depose to the notice having been properly stuck up and published. On the other side, *viz.*, for the plaintiff, we have the evidence of the gomashta of the plaintiff who was residing at the time in the cutcherry; he says that he never saw or heard of any such notice, [311] and that no such notice was ever stuck up or duly published in the cutcherry. His evidence is supported by that of two or three leading men in the village, who depose to the same effect. There is, therefore, a substantial controversy on the evidence, and I am not disposed to say, nor do I think I should be justified in saying, that upon the evidence the conclusion arrived at by the learned Judge in the Court below was wrong.

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The formalities prescribed in the second clause of s. 8 of the above Regulation were certainly not complied with. That clause says: "The zemindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon who shall bring back the receipt of the defaulter, or of his manager for the same; or in the event of inability to procure this, the signature of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot." The peon obtained the receipt of the gomashta of defendant No. 3, but he was not the sole defaulter: he did not get the receipt of the two defaulters or of their managers or the signature of three substantial persons residing in the neighbourhood, nor did the peon go to the cutcherry of the nearest Munsif or to the nearest thannah or make the oath or obtain the certificate referred to in the clause. It is clear then that these requisite formalities of the Regulation were not complied with.

It is urged, however, by the learned vakil for the appellant, upon the authority of the case of *Sona Beebee* v. *Lallchand Chowdhry* (1) that those requirements are directory merely, and that, if it be proved that the notice has been duly published, it is not necessary that those requirements should be strictly complied with. Sir Barnes Peacock, no doubt, says: "The material part of cl. 2, s. 8, Reg. VIII of 1819, so far as this case is concerned, is that the notice required to be sent into the mofussil shall be served. The zemindar is exclusively answerable for the observance of the forms prescribed by that clause. The subsequent part of the section, which prescribes that the serving peon shall [312] bring back the receipt of the defaulter, or of his manager, or in the event of his inability to procure it, that he shall obtain that which, by the Regulation, is substituted for it, is merely directory, and, if not done, does not vitiate the sale, provided the notice is duly served."

That case has been commented upon by their Lordships of the Judicial Committee of the Privy Council in the case of the *Maharajah of Burdwan* v. *Tara Sundari Debi* (2). At p. 622 there is this passage:—

"That is a very important Regulation" (meaning the above Regulation). "and no doubt it was enacted for a certain and defined policy, and ought, as a rule, to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zemindar, who institutes the proceeding, exclusively responsible for its regularity. Their Lordships do not, however, intend at all to controvert a decision to which their attention was called, of Sir Barnes Peacock when he filled the office of Chief Justice of the High Court of Bengal, to the effect that if the notice itself has been duly published, if it is not matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself."

In a later case, the case of the *Maharani of Burdwan* v. *Krishna Kamini Dasi* (3), the case I have just referred to is thus commented upon by their Lordships at p. 373: "In the case of the *Maharajah*

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(1) 9 W. R. 242.
(2) 9 C. 619 (622) = 10 I. A. 19 (22).
(3) 14 C. 365 = 14 I. A. 20.

1899 AUG. 22. — APPELLATE CIVIL. — 27 C. 308.

of Burdwan v. *Tara Sundari Debi* (1), this Committee found that the question whether the requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held that the decision must go against the zemindar, whose business it was to follow the prescribed method. They did not differ from Sir Barnes Peacock, nor did they hold that the statutory proof was the only proof that could be given. Neither [313] did Sir Barnes Peacock decide or intimate any opinion that one of the important formalities required as preliminary to a sale could be dispensed with."

From these decisions I conclude that, if the fact of the due publication of the sale notice be not in controversy, be not the subject of conflicting evidence, then it is not incumbent upon the zemindar to show that the formalities prescribed by the statute have been complied with, but that, if there be a conflict of evidence on the point, and the zemindar cannot show that the statutory method of proof prescribed has been followed, the decision must go against him, as it is his business to follow the prescribed method. In the present case there is a most distinct conflict of evidence as to whether the notices were or were not duly published, and the zemindar cannot show that the statutory method of proof prescribed has been followed. His case, there fore, fails.

On these grounds, I consider that the decision of the Court below was right, and that this appeal No. 332 must be dismissed with costs.

As regards the appeal No. 329, which is an appeal upon the question of costs by the minor defendant No. 3, who had been ordered jointly with the other defendants by the Court below to pay the plaintiff's costs, in my opinion such appeal ought to succeed. This appellant was not asked by the plaintiff to join as a co-plaintiff, and, looking at the nature of his defence, which is practically tantamount to a submission of his rights in the matter to the Court, he ought not to have been held liable to pay the plaintiff's costs. That portion of the decree of the lower Court which makes him liable for the plaintiff's costs must, therefore, be reversed. He will neither pay nor will he receive any costs in the Court below, but he must have his costs of this appeal both as against the plaintiff and the defendant No. 1, who has resisted his appeal.

As regards the appeal No. 348, which is the appeal of the auction-purchaser, he raises two points; *first*, that the decree of the Court below is wrong in not allowing him interest on his purchase money; and, *secondly*, that it is equally wrong in holding him [314] jointly liable for the costs of the plaintiff in the suit. As regards the latter point, the learned Judge in the Court below was right. The auction-purchaser, instead of submitting, as he might have done, his rights to the Court to deal with as it thought fit, made common cause with the zemindar against the plaintiff, set up in his defence that the notices had been duly published, and urged that the sale was a binding and valid sale. He resisted the plaintiff and resisted him unsuccessfully, and has consequently rendered himself jointly with the defendant No. 1 liable for the plaintiff's costs of the suit.

As regards the question of interest this appeal must succeed. Section 14 of Reg. VIII of 1819 says: "The purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale" (which is what happened here), "the Court shall be careful to indemnify him against all loss at the charge of the zemindar or person at whose suit

(1) 9 C. 619 (622) = 10 I.A. 19 (22).

the sale may have been made." He is entitled to be "indemnified," and he is not indemnified if he simply gets back his purchase money without any interest. He is clearly entitled to interest on his purchase money at 6 per cent per annum. The decree of the Court below must, therefore, to that extent, be reversed. As he has partially succeeded, and partially failed, on this appeal, there will be no costs on either side.

1899 AUG. 22. — APPELLATE CIVIL. — 27 C. 308.

BANERJEE, J.—I am of the same opinion. I only wish to add a few words with reference to appeal No. 332 of 1897, that is, the appeal of the zemindar. The main question raised in that appeal is, whether the sale notifications were duly published; and the point in dispute with reference to the sale notifications was, whether the notice required by cl. 2 of s. 8 of Reg. VIII of 1819 to be served in the defaulting putnidar's cutcherry was, in this case, duly published.

Upon this question, having regard to the evidence adduced in the case, I am of opinion that the answer must be in favour of the plaintiff. The law makes the zemindar "exclusively answerable for the observance of the forms" prescribed in the second clause of s. 8 of the *putni* Regulation. The evidence adduced on the side of the zemindar, defendant, is not, to my mind, quite satisfactory, seeing that the zemindar's serving officer, **[315]** who said that he had been to the cutcherry of the defaulter on more occasions than one, could not remember on which side of the road, running through the village, the cutcherry was; and seeing also that his statement as to the publication of the sale notice in the cutcherry is contradicted by three witnesses examined for the plaintiff, one of whom says he was in the cutcherry at and about the time of the alleged publication, and the other two say that they are the *mandals* of the village, who used, on previous occasions, to be sent for at the time of publication of sale notices.

In this view of the evidence it is not absolutely necessary for us to say anything upon the question of law raised in the case; but as that question was discussed at some length, and as the Court below has pronounced an opinion upon the point, it may be desirable that I should say a few words upon it.

The question of law raised is this, namely, whether, if it is found that the sale notice was published in the defaulter's cutcherry, it is still necessary for the zemindar to make out that the mode in which such publication is required by cl. 2 of s. 8 to be proved, had been observed.

Where there is no controversy as to the due publication of the notice, and the only dispute is as to whether the statutory mode of proof of such publication was resorted to, the answer to this question must be in the negative according to the decision of the Privy Council in the cases of *Maharajah of Burdwan* v. *Tara Sundari Debi* (1) and *Maharani of Burdwan* v. *Krishna Kamini Dasi* (2). But where, as in this case, there is a controversy, and a substantial controversy, as to whether the sale notice in the mofussil, that is, in the defaulter's cutcherry, has been duly published, or not, the question whether the mode of proof of the publication of the sale notice prescribed by law has, or has not, been resorted to, cannot be said to be an immaterial question. This will appear clear from the following passage in the judgment of the Privy Council in the second of the two cases just cited. In that case their Lordships observe: "In the case of *Maharajah of Burdwan* v. *Tara Sundari Debi* (1) this Committee found that the **[316]** question whether the requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly

(1) 9 C. 619=10 I. A. 19.

(2) 14 C. 365=14 I. A. 20.

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not been followed, and they held that the decision must go against the zemindar, whose business it was to follow the prescribed method. They did not differ from Sir Barnes Peacock, nor did they hold that the statutory proof was the only proof that could be given. Neither did Sir Barnes Peacock decide or intimate any opinion that one of the important formalities required as preliminary to a sale could be dispensed with."

No doubt there is a distinction between the thing to be proved and the mode of proving it; but if there is any controversy as to the thing to be proved, the question whether the statutory mode of proving it has or has not been resorted to cannot be regarded as immaterial to the inquiry.

The thing to be proved is, as I understand it, the publication of the sale notice in the cutcherry of the defaulting *patnidar*. The mode of publication is, according to the section, publication by sticking up the notice in some conspicuous part of the cutcherry; but the mere sticking up the notice would not, as the learned senior Government Pleader appeared to contend, be a sufficient publication by itself. For if that were so, a mere sticking up of the notice without any intention of allowing it to remain stuck up, and with the object of taking it off the next moment, would be sufficient service of notice. That could never have been intended. It is clear, from the several parts of the clause, that what is intended is the real and *bona fide* publication of the sale notice.

Then again, although occurring in the part relating to the mode of proof of the publication, we have these important words in the section: "The zemindar shall be exclusively answerable for the observance of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter, or of his manager, for the same; or, in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot."

[317] That indicates, indirectly no doubt, that the notice is to be published, and then the serving officer is to make some *bona fide* endeavour to obtain the receipt of the defaulter or his manager; and it is only in the event of his inability to procure such receipt that the other modes of proof are to be resorted to. In saying this, I must not be understood to mean that the receipt of the defaulter or of his agent is necessary, or that personal service of the notice on the defaulter is required. The law does not make personal service of notice on the defaulter necessary or sufficient. But it must be borne in mind that where there is a dispute as to the due publication of the sale notice, the question whether the serving officer made any *bona fide* endeavour to obtain the defaulter's or his agent's receipt in the first instance, as required by law, must have an important bearing upon the inquiry, especially where the point for determination is whether the alleged publication was real or colourable only. Of course, what would be a sufficient endeavour to obtain such a receipt must depend upon the circumstances of each case. In the present case there was not only no endeavour to obtain the receipt of one of the two defaulters, that is the plaintiff, or his agent, but, as I have said above, the evidence as to the sticking up of the notice in the defaulter's cutcherry is quite unsatisfactory.

S. C. G. *Appeal dismissed.*

27 C. 317=4 C.W.N. 348.

1900 JAN. 22.

APPELLATE CRIMINAL.

27 C. 317=4 C.W.N. 348.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

THE GOVERNMENT OF BENGAL (*Appellants*) *v.* SENAYAT ALI AND ANOTHER (*Respondents*).* [22nd January, 1900.]

Bengal Municipal Act (Bengal Act III of 1884), ss. 155, 156—Ferry, Meaning of—Boat plying for hire without license within prescribed limits of ferry—Right of ferryman to demand tolls.

The expression "a ferry" in the Bengal Municipal Act means the exclusive right to carry passengers across the stream from one bank to the other on payment of certain prescribed tolls. The object of s. 155 of that Act appears to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license within the prescribed limits. *Semble*, therefore, that the mere crossing of the bar of a [318] *khal* leading into the limits of a Municipal ferry would not constitute a breach of the Act.

A ferryman has no authority to demand tolls from persons who are merely passengers in an unlicensed boat. The remedy against the person who keeps a ferry-boat without a license plying within the prescribed limits is provided by s. 156 of that Act.

[R., 28 M. 517=15 M.L.J. 466 (468).]

IN this case it appeared that a certain *khal* called the Sikalbaha *khal* flowed into the Kurufali river, and that on that river there was a municipal ferry plying in the neighbourhood of that *khal*. The complainant alleged that he and certain other persons had embarked at Goloke Peshkar's *hat* some six or seven miles from the municipal ferry; that they came down the Sikalbaha *khal* in a *sampan*; that somewhere between Kalapal and the mouth of the *khal* tolls were demanded from them by the accused persons, and they were forcibly detained by the accused for three hours, and not allowed to proceed until the arrival of the *ijaradar* Jimat Ali. The accused, who were employed by Jimat Ali, the *ijaradar* of the municipal ferry, to collect tolls, alleged that the boat came from Kalapal; that no force was used to detain the complainants, but that the boat was detained by the rough weather for an hour. The accused were convicted by the Assistant Magistrate of Chittagong under s. 341 of the Indian Penal Code.

On appeal, the District Magistrate set aside the conviction and sentence, holding that he was bound to follow a judgment in a precisely similar case delivered by the Sessions Judge in which the Sessions Judge held that the crossing of the bar at the mouth of the *khal* so as to enter the Kurufali river and to land passengers on the opposite bank constituted a breach of the Municipal Act.

An appeal was then preferred by the Local Government against the order of acquittal.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown.

The judgment of the High Court (PRINSEP and STANLEY, JJ.) was as follows:—

JUDGMENT.

The matters raised for our determination in this appeal relate to the construction of the sections regarding Municipal ferries contained in the Bengal Municipal Act. Certain persons were travelling by *sampan* in a *khal* which flows into the Kurufali river. On that

* Appeal No. 4 of 1899, against the order passed by J. H. Lea, Esq., District Magistrate of Chittagong, dated the 10th August 1899.

1900 JAN. 22. — APPELLATE CRIMINAL. — 27 C. 317 = 4 C.W.N. 348.

river there is a municipal ferry [319] plying in the neighbourhood of that *khal*. Complaint was made to the Magistrate by some passengers in a boat going through that *khal*, and after entering the Kurufali river, landing them on the opposite side, that they had been stopped by the servants of the ferryman, and had been made to pay tolls under the Municipal Act as if they had crossed that river in a municipal ferry boat.

There was some argument before the Assistant Magistrate, who held the trial, whether the terms of s. 155 of the Municipal Act in regard to the limits of the ferry would apply to passengers going from a distance of more than two miles through the *khal* into the river so as to convey them to the opposite bank. For the defence, it was contended that the passengers had entered that boat within two miles from the mouth of the *khal*, and were therefore within the terms of s. 155. The Assistant Magistrate, however, held, on the evidence, that the passengers had entered the boat beyond the limit of two miles; that, therefore, they would not come within the terms of the Municipal Act; and that consequently the demanding and obtaining payment of tolls from them by the servants of the municipal ferryman and their detention until such payments were made, constituted the offence of wrongful restraint, of which he accordingly convicted the servants and sentenced them to a fine.

On appeal, the District Magistrate held that he was bound to follow a judgment in a precisely similar case delivered by the Sessions Judge, in which that officer had held that the crossing of the bar at the mouth of the *khal*, so as to enter the Kurufali river, and to land passengers on the opposite bank, constituted a breach of the Municipal Act. He accordingly set aside the conviction and sentence.

An appeal has been made by the Local Government against the order of acquittal.

Now in regard to the merits of the case, we may at once say that the ferrymen under no circumstances had authority to demand tolls from these persons who were merely passengers in an unlicensed boat. The remedy is provided by s. 156 of the Municipal Act against the person who keeps a ferry boat without [320] license plying within the prescribed limits. The conviction and sentence were therefore proper, and must be restored.

But, as a part of this case, we have been asked to consider whether the Magistrate is right in adopting, as a matter of law, the precedent of a judgment of the Sessions Judge in a former case; that is to say, whether the mere crossing the bar of the *khal* leading into the limits of the municipal ferry would constitute a breach of the Act. We are of opinion that the view expressed by the learned Sessions Judge is erroneous. The crossing of the bar of a stream so as to enter another stream would constitute no breach of ss. 155 and 156. A "ferry," as we understand the meaning of that expression in the Bengal Municipal Act, means the exclusive right to carry passengers across the stream from one bank to the other on payment of certain prescribed tolls, and the object of s. 155 appears to us to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license within the prescribed limits. On both grounds therefore the order of the District Magistrate on appeal setting aside the conviction and sentence is bad.

The order of the Assistant Magistrate is restored.

D. S.

27 C. 320=4 C.W.N. 311.

1900
JAN. 26.

CRIMINAL REVISION.

27 C. 320=4 C.W.N. 311.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

QUEEN-EMPRESS *v.* BASANT LALL AND OTHERS (*Accused*).*
[26th January, 1900.]

Arrest—Arrest by police on an order in writing—Whether police obliged to show authority under which they act to person arrested—Resistance to such arrest—Escape from custody—Code of Criminal Procedure (Act V of 1898), ss. 56 and 80—Penal Code (Act XLV of 1860), s. 224.

There is nothing extending s. 80 of the Code of Criminal Procedure to an arrest made by the police on an order in writing under s. 56 of that Code, so as to require that any information as to the authority under which the police are acting must be given to the person arrested in order to make it an arrest warranted by law.

[321] It may be desirable or even obligatory that if called upon the police officer making such an arrest should show the person arrested the authority under which he is acting; but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful, would be to extend the law beyond what the Legislature has thought proper to declare it.

[F., 5 N L R 4=9 Cr.L.J. 211=1 Ind. Cas. 238; 6 S.L.R. 120=13 Cr.L J. 771=17 Ind. Cas. 403.]

ONE Basant Lall was charged with offences under ss. 147 and 379 of the Penal Code. On the 26th of September 1898 the Inspector, who had investigated the case, handed to a Sub-Inspector a *purwana* directing him to examine certain witnesses and arrest certain accused persons including Basant Lall. Early in the morning of the 27th of September the Sub-Inspector, with a Head-constable and a constable went to Khusrupur to make the arrest. They found Basant Lall at his *Gola*. The Sub-Inspector ordered the Head-constable to arrest him, which he did, by catching hold of Basant Lall. At the same time the Sub-Inspector told Basant Lall what he was charged with. Basant Lall stood up and tried to get free and shouted out to his men to come up and beat the police. A number of men surrounded the police and released Basant Lall from the grasp of the Head-constable and enabled him to escape into his zenana. A prosecution was instituted against Basant Lall under s. 224 of the Penal Code, and against certain of the others under ss. 147 and 225 of the Penal Code. Basant Lall was convicted under s. 224 and sentenced to three months' simple imprisonment; the other accused were also convicted and sentenced to various terms of imprisonment. Basant Lall preferred an appeal and the other accused made an application for revision in the Court of the Sessions Judge of Patna. The appeal and the application for revision were transferred for disposal to the Court of the Sessions Judge of Shahabad. On his appeal Basant Lall was acquitted on the ground that his arrest or attempted arrest was not legal; the Sessions Judge being of opinion that the procedure laid down in s. 80 of the Code of Criminal Procedure should have been followed, and Basant Lall should have had notified to him the authority and cause of his arrest, and the Sessions Judge referred the convictions and sentences of the other accused to the High Court with a recommendation that they should also be set aside on the same ground. In the letter of reference he referred

* Criminal Revision No. 260 of 1899, made against the order passed by F.H. Harding, Esq., Sessions Judge of Shahabad, dated the 9th of December 1899.

1900 JAN. 26. — CRIMINAL REVISION. — 27 C. 320 = 4 C.W.N. 311.

to the [322] cases of *Satish Chundra Rai* v. *Jodu Nandan Singh* (1), and *In the matter of Durga Tewari* (2) decided by the High Court on 29th November 1899.

On consideration of this reference it appeared to the Judges of the Criminal Bench of the High Court that *prima facie* the law laid down by the Sessions Judge on which he set aside the conviction and sentence on Basant Lall was erroneous. They, therefore, deferred passing any orders with reference to the other accused, and directed that a rule should issue on Basant Lall to show cause why the order of acquittal passed on his appeal should not be set aside.

Sir *Griffith Evans* (with him Mr. *P. L. Roy*, Mr. *Abdur Rohim*, Mr. *C. R. Dass* and Babu *Atulya Charan Bose*), for the accused.

JUDGMENT.

PRINSEP, J. (STANLEY, J., concurring).

Several persons were tried together by the Magistrate of Shahabad for various offences connected with s. 224 of the Indian Penal Code. The sentences passed on these persons were not appealable with the exception of the sentence passed on Basant Lall. On his appeal the Sessions Judge has acquitted him, setting aside the conviction and sentence, and he has referred the convictions and sentences of the others to this Court with a recommendation that they also be set aside on the same ground as that upon which he acquitted Basant Lall on his appeal. On consideration of this reference, it appeared to the Judges of the Criminal Bench, of which I was one, that *prima facie* the law laid down by the Sessions Judge on which he set aside the conviction and sentence on Basant Lall was erroneous. We, therefore, deferred passing any orders with reference to the others directing that a rule should issue on Basant Lall to show cause why the order of acquittal passed on his appeal by the Sessions Judge should not be set aside, having previously recited the reason for so doing. The last portion of the rule was not accurately expressed, for it proceeded to state "and why the [323] conviction and sentence passed by the Magistrate should not be restored." The reason for this order, I may say, was that we contemplated at that time that we should deal with the whole case, bringing up the appeal of Basant Lall for hearing from the Court of the Sessions Judge.

However, now that this matter is before us, we think it right to consider the case from another point of view, and that is that if we hold that the Sessions Judge has acquitted Basant Lall on a misapprehension of the law relating to this matter, we should more properly direct him to hear the appeal on the merits having set aside his order acquitting the appellant. The Sessions Judge has acquitted Basant Lall on the ground that Basant Lall was not lawfully arrested, and he has come to this conclusion, because he considers that the procedure laid down in s. 80 of the Code of Criminal Procedure should have been followed, that is to say, that on his arrest Basant Lall should have had notified to him the authority for and the cause of his arrest. Section 80, however, applies only to the execution of a warrant of arrest. The arrest in this case was made by an order in writing under s. 56 in regard to an arrest which certain police officers can make without a warrant. The two sections relate to matters entirely different and appear in different chapters of the Code, and there is nothing extending s. 80 to

(1) 26 C. 748.   (2) See 4 C.W.N. 85 Unreported.

an arrest made by the police on an order in writing, so as to require that any information must be given to the person arrested in order to make it an arrest warranted by law. The order in writing is an authority to a subordinate police officer to make an arrest, which the superior police officer, if present, could himself make on his own responsibility. It may be desirable or even obligatory that if called upon the police officer making such an arrest should show the person arrested the authority under which he is acting, but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful would be to extend the law beyond what the Legislature has thought proper to declare it. This would be to exceed our jurisdiction which is to declare what the law is and not to make the law.

1900 JAN. 26.

CRIMINAL REVISION.

27 C. 320 = 4 C.W.N. 311.

This, as we understand his reference to us in revision and his judgment on the appeal on which the Sessions Judge relies in [324] making the reference, is the ground upon which he has acquitted Basant Lall. We think it unnecessary in this case to enter into any consideration of the merits of that appeal. Those are matters which should be left to the Sessions Judge to be dealt with in due course on the hearing of the appeal. He has not dealt with the merits. He has acquitted the accused Basant Lall simply on an erroneous view of the law. The proper order, therefore, to pass in this matter is to set aside the order acquitting Basant Lall, because it proceeds on an erroneous view of the law and to direct a rehearing of the appeal, and we think this is the only order which we can properly pass on a rule issued to consider and deal with this matter. We are also of opinion that it is unnecessary, as the case is now before us, to consider further in revision the conviction and sentences passed on the other accused.

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27 C. 324 = 4 C.W.N. 440.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

QUEEN-EMPRESS v. KHETTER MOHUN CHOWDHRY AND OTHERS.*
[8th January, 1900.]

Stamp Act (I of 1879), ss. 58, 61 and 64—"Signing otherwise than as a witness, etc.," Meaning of—Liability of agent authorized to sign on behalf of principal—Granting of unstamped receipt—Refusal to grant stamped receipt by firm—Liability of members of such firm—"Person," Meaning of—Proof of demand of receipt.

The expression "signing otherwise than as a witness, etc." as used in s. 61 of the Stamp Act, means the writing of a person's name by himself or by his authority, with the intent of authenticating a document as being that of the person whose name is so written. An ordinary agent authorized to sign on behalf of his principal would fall within this description, and consequently within the purview of the section.

Where, therefore, a person signed a firm's name to certain letters under the authority of the firm, the circumstance that the body of the letters were written at the dictation of the manager of the firm was held not to be sufficient to distinguish his case from that of any other agent.

The term "person" in ss. 61 and 64 of the Stamp Act, includes the members of a trading partnership. So where certain persons, members of [325] a firm carrying on business in Calcutta as general dealers (which firm had acknowledged the receipt of certain sums of money from one L and had refused to grant him a

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* Criminal Reference No. 1 of 1899, made by T.A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 30th of May 1899.

1900 JAN 8.

CRIMINAL REFERENCE.

27 C. 324 = 4 C.W.N. 440.

stamped receipt), were charged under s. 61 of the Stamp Act with having granted an unstamped receipt, and under s. 64 of that Act having refused to grant a duly stamped receipt, it was held that their liability depended on whether they were in contemplation of law the persons who signed the letters of acknowledgment or refusal to give the receipt, and not on whether they were present at the writing of the letters, or knew of the writing of them; provided that it was established by evidence that a requisition for a receipt had been made under s. 58 of that Act.

IN this case it appeared that the members of the firm of Nobin Chunder Coondoo & Co. carried on business in Calcutta as general dealers. In that character they sold goods from time to time to one Mr. Lee of Purneah. In payment for these goods Lee sent to the firm on the 6th July 1898 a cheque for Rs. 400, on the 19th October 1898 a cheque for Rs. 200, and on the 28th January 1899 a cheque for Rs. 200. All these cheques were duly received and cashed by the firm, and the receipt of them was acknowledged by the firm by letters dated respectively the 11th July 1898, the 24th November 1898, and the 3rd February 1899. None of these letters bore a receipt stamp. On the 8th February 1899 a letter was written to Lee by the firm, in answer apparently to a demand on his part for a stamped receipt in respect of the above payments, declining to grant him a stamped receipt. The first accused and the members of the firm of Nobin Chunder Coondoo, accused Nos. 2 to 6, were charged with having on the 24th November 1898 granted an unstamped receipt in respect of a sum of Rs. 200, and also with having refused to grant a duly stamped receipt. The third accused was charged in his individual capacity with having abetted the commission of these offences. The scope of the prosecution was, however, amplified by the Magistrate, so as to embrace the two other letters of the 11th July 1898 and the 3rd February 1899.

The case was referred by the Chief Presidency Magistrate, under s. 432 of the Criminal Procedure Code, for the opinion of the High Court.

The letter of reference was as follows:—

This is a prosecution under ss. 61 and 64 of the Stamp Act. The accused Nos. 2, 3, 4, 5 and 6 are alleged to be members of the firm of Nobin [326] Chunder Coondoo & Co., of 90 and 91 New Market, and the accused No. 1 is a writer employed occasionally by the firm to write English letters for them.

"The accused Nos. 2, 3 and 5 are out of Calcutta and have been allowed to appear by their pleader. The accused Nos. 1, 4 and 6 are present in Court.

One Tara Prosonno Chatterjee proves that the partners in the firm of Nobin Chunder Coondoo of 90 New Market are Nobin Chund and Gopal Coondoo, the second and fifth accused. The fourth and sixth accused have been proved to be partners in the firm; they are said by the manager of the firm, Bycunto Nath Roy, to be non-working partners, but I do not believe this, as accused No. 6, when giving evidence as a witness in a case brought against Bycunto Nath Roy concerning the same documents under the Stamp Act, has admitted that he manages the business in conjunction with Bycunto Nath Roy in the absence of his father. I find, therefore, that accused Nos. 4 and 6 are ordinary partners in this firm.

"There is some meagre evidence that the second, third and fifth accused were not in Calcutta when the monies and cheques about to be referred to were received by the firm; and although I accept that evidence, there being nothing to contradict it, as regards the whereabouts of the accused Nos. 3 and 5, I think it is quite clear from Khetter Mohun's deposition in the case against Bycunto, to which I have referred, and

which deposition is marked Ex. IX, that the second accused was in Calcutta when the letters, Exs. D and F were written. There is evidence to show that the sixth accused was not in Calcutta between July 1898 and February 1899, the dates between which the cheques and monies were received, but there is evidence to show he was in Calcutta in March 1899.

The documents to which this prosecution refers are three cheques, *viz.*, "a cheque for Rs. 400 drawn in favour of Nobin Chunder Coondoo, dated the 6th July 1898, and marked Ex. G.; (2) a cheque for Rs. 200 drawn in favour of Nobin Chunder Coondoo, dated the 19th October 1898, and marked Ex. H; and (3) a cheque for Rs. 200 drawn in favour of Nobin Chunder Coondoo, dated the 28th January 1899, marked Ex. I, and three letters acknowledging the receipt of the above mentioned three cheques addressed to Mr. Lee, the sender of the cheque, dated 11th July 1898 and marked Ex. B; a letter, dated the 24th November 1898, acknowledging the receipt of the cheque Ex. H, which letter is marked Ex. C. And *thirdly* a letter, dated the 3rd February 1899, which is marked Ex. D, and is a letter acknowledging the receipt of the cheque Ex. I. All these three letters are written in English and are signed " Nobin Chunder Coondoo & Co.," and they are all addressed to Mr. Lee of Purneah, the sender of the cheques, and are unstamped as receipts. It is in evidence that the accused, the partners of the firm, cannot write English letters, and that their manager, Bycunto Nath Roy, is also unable to do so, save that he can write the name of the firm in English. It is proved that these three letters, Exs. B,C, and D, were written and signed by the first accused, a bazar writer, who is employed by the firm of Nobin Chunder Coondoo to write their [327] English letters. The first accused, Khetter Mohun, in his deposition in the former case against Bycunto, which has been put in in this case and marked IX, admits that he wrote the letters, Exs. F and D, when Nobin Chunder Coondoo was in Calcutta, and that he signs all letters in English for the firm under a verbal authority given him by Nobin Chunder Coondoo.

"It is also proved by other evidence in this case that the letters B, C and D, were written and signed by the first accused Khetter Mohun, Bycunto Nath Roy, the manager of the firm, stating that these letters (as also another which is Ex. F) were all written by the first accused at his dictation and order, he being authorized to empower the first accused to write in the name of the firm.

"The three cheques, Exs. G, H, and I, were all sent by Mr. Lee of Purneah to Nobin Chunder Coondoo & Co., in payment of his account with them; the cheques were cashed by the firm and the monies received by the firm's manager, Bycunto Nath Roy. Mr. Lee received no stamped receipt for his cheques, and evidently wrote several letters (not produced) on the subject to the firm, but he states he never got formal receipts. Mr. Lee's letters of demand are with the accused firm, but the firm wrote in reply to Mr. Lee a letter, dated the 8th February 1899, which clearly shows a demand was made by Mr. Lee for a stamped receipt, and in that letter they refused to give a receipt. This letter is Ex. F, and was one of the letters put to Khetter Mohun Coondoo when giving his evidence in the case against Bycunto (see his deposition Ex. IX) and he there states that their letter (which was then marked as Ex. B in that case) was written by him at a time when Nobin Chunder Coondoo was in Calcutta. Mr. Lee, being unable to obtain stamped receipts from the firm, sent the

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letters, Exs. B, C, and D, to the Collector of Calcutta, and hence this prosecution on the Collector's sanction, which is Ex. A.

"Before the case came on, the manager of the firm, Bycunto Nath Roy, and one of the partners, the sixth accused (for I find this as a fact notwithstanding Bycunto's evidence that he went alone), went to Mr. Eagleton at the Collectorate in March 1899 and admitted their offence, and at the same time presented to him the letter, Ex. E, which was signed by Bycunto in the presence of Mr. Eagleton; Mr. Eagleton then states that he showed them at the time of their conversation the letters B, C, D, and F, and I believe his statement. There is no doubt but that the letter, Ex. E, refers to the letters B, C, D, and F, although they are not specifically mentioned. I should add that Mr. Eagleton's evidence has been attacked on the ground that he, in the case of Bycunto, stated that the letters B, C, and D were written by Bycunto, and that now in this case he states they are written by the first accused. There is a perfect answer to his having done so; he did it merely on a comparison of the signatures, and from having once seen Bycunto write his name in Court in a third case before either of these two cases. The comparison made was with writings admitted by Bycunto to be his, and, as I think probable, it was an admission for the purpose of getting out of the case cheaply without a hearing as is often done; [328] but I think the signature which he admitted to be his was not really his from a comparison of it with the writing of the first accused. I don't think there is really any reason to say that on account of being so misled he has in this case wilfully committed perjury. I may say that Mr. Eagleton is constantly in my Court, and I believe him to be an honest and truthful witness.

"It is said in defence in this case that the partners of the firm are not to be held responsible for the non-stamping of the letters and the refusal to give a receipt, as both offences were committed by or under the authority of the firm's manager Bycunto. There can be no doubt but that the first accused has technically committed on offence under the second paragraph of s. 61 of the Stamp Act, as having executed a receipt not duly stamped; he, however, is more or less in the position of a mere amanuensis and did what he was told to do; still he ought to have insisted on the letter being stamped before execution. He states that his power, however, is derived from Nobin Chunder Coondoo, and Bycunto says he dictated the letter to him and caused him to write and sign it. Under these circumstances, should the first accused be convicted of an offence under s. 61 of the Stamp Act?

"Then, *secondly*, although there is no doubt in my mind but that Bycunto, had he been an accused, and had the same evidence been given against him as has been given in this case, could have been convicted under s. 64 of the Stamp Act for a refusal to give a receipt, yet the question before me now is whether the accused, who are the partners of the firm, can be held responsible for such refusal. There is absolutely no doubt but that accused No. 4 was in Calcutta at the time of the receipt of the monies and the writing of the letters, and that Nobin Chunder Coondoo, another partner, was present also at Calcutta at the time; the other partners, 3, 5 and 6, being out of Calcutta at the time. Can then either the second or fourth accused, or the partners Nos. 3, 5, and 6, be held responsible for this refusal? Or even, having regard to the authority given by the firm to the first accused to sign and write their English letters, can either or any of them be convicted under s. 61?

"There seems to be no direct authority on the point. The general rule of criminal law seems to be that a master is not criminally responsible for the acts of his servants unless they are done by his command or directions or with his consent; but there are cases in which a statute expressly orders or forbids the doing of a particular act and imposes a penalty for disobedience, and in construing such statutes the liability of an employer for the act of his servant depends upon whether the master was or was not ignorant of the act being done, and in some cases it appears that if a master places another in complete charge of his premises, he substitutes that person for himself and accepts liability for his acts and the knowledge of that person is his knowledge, and he is as responsible as if he had suffered or permitted whatever his delegate suffers or permits; this class of cases refers no doubt mostly to License Acts. The question, however, is not without difficulty and appears to be without authority.

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[329] "I would, therefore, refer the following questions to the Hon'ble the Judges of the High Court:—

"1. Has the accused No. 1, who wrote and signed the letters, Exs. B, C and D, though under the authority of Nobin Chunder Coondoo, and under dictation of the manager of the firm, Bycunto Nath Roy, committed an offence under s. 61 of the Stamp Act?

2. Are either or any of the partners of the firm, having regard to the authority given by one of them and by their manager to write and sign English letters, whether present or absent at the time of the execution of the letters, guilty of an offence under s. 61 of the Stamp Act as an abettor or otherwise?

3. Can (*a*) the accused Nos. 2 and 4, who were present in Calcutta at the time of the receipt of the monies and the writing of the letters, be held responsible under s. 64 for the refusal to give a stamped receipt referred to in the letter, Ex. F; or (*b*) can any of the partners absent from Calcutta at the time be held responsible for such refusal under s. 64 of the Act?"

The Standing Counsel (Mr. *O'Kinealy*), for the Crown.

The opinion of the Court (PRINSEP and HILL, JJ.) was as follows:—

OPINION.

This is a reference made by the Chief Presidency Magistrate of Calcutta under s. 432 of the Code of Criminal Procedure, and arising out of a prosecution under ss. 61 and 64 of the Indian Stamp Act of 1879.

The persons accused are (1) Khetter Mohun Chowdhry; (2) "the members of the firm of Nobin Chunder Coondoo & Co.," namely, Nobin Chunder Coondoo, Radha Mohun Coondoo, Cheytan Chunder Coondoo, Gopal Chunder Coondoo and Jadu Nath Coondoo; and (3) Nobin Chunder Coondoo of the firm of Nobin Chunder Coondoo & Co.

From the formal charge sheet, it appears that the first accused and the members of the firm of Nobin Chunder Coondoo & Co. were charged with having, on the 24th November 1898, granted an unstamped receipt in respect of a sum of Rs. 200, and also with having, on a date which is not specified, refused to grant a duly stamped receipt. The third accused was charged in his individual capacity with having abetted the commission of these offences.

The scope of the prosecution has, however, been amplified by [330] the Magistrate so as to embrace two other letters similar in their character

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to that of the 24th November 1898, and dated respectively the 11th July 1898 and the 3rd February 1899.

But inasmuch as the alteration does not affect the answers which we propose to return to the questions submitted to us, this point need not now be dwelt upon.

The facts of the case, in so far as they are at present material, may be shortly stated. It appears that the members of the firm of Nobin Chunder Coondoo & Co. carry on business in Calcutta as general dealers. In that character they sold goods from time to time to a Mr. Lee of Purneah. In payment (whether partial or full payment is immaterial) for these goods, Mr. Lee sent to the firm on the 6th July 1898 a cheque for Rs. 400, on the 19th October 1898 a cheque for Rs. 200, and on the 28th January 1899 a cheque for Rs. 200. All these cheques were duly received and cashed by the firm, and the receipt of them was acknowledged by the firm by letters, dated respectively the 11th July 1898, the 24th November 1898, and the 3rd February 1899. None of those letters bore a receipt stamp. Then on the 8th February 1899 a letter was written to Mr. Lee by the firm, in answer apparently to a demand on his part for a stamped receipt in respect of the above payments, declining to grant him a stamped receipt. It is upon the basis of this letter that the second head of the charge seems to have been framed.

For the present purpose, we may assume that Mr. Lee's requisition, to which the letter of the 8th February appears to have been an answer, was duly proved. We think it right, however, to direct the attention of the Magistrate to the matter, since strict proof of the requisition is quite as essential to a conviction under s. 64 of the Act as proof of the refusal, and it is not clear that the law in this respect has been complied with.

With respect to the relation in which the first accused stood at the time of the writing of the above letters to the firm of Nobin Chunder Coondoo and Co., the finding of the Magistrate is somewhat vague. At the outset of the order of reference, he is referred to as "a writer employed occasionally by the firm [331] to write English letters for them." Later on he is described as "a bazar writer who is employed by the firm of Nobin Chunder Coondoo to write their English letters," and reference is made to an admission of the first accused in another trial that "he signs all letters in English for the firm under a verbal authority given him by Nobin Chunder Coondoo." Again it is said to be proved that the letters now in question were written and signed by the first accused, "the manager of the firm stating that these letters * * * * were all written by the first accused at his dictation and order, he being authorized to empower the first accused to write in the name of the firm;" and again, "he, however, is more or less in the position of a mere amanuensis * *. He states that his power, however, is derived from Nobin Chunder Coondoo, and Bycunto (the manager) says he dictated the letter to him and caused him to write and sign it." It seems to us difficult upon these statements to arrive at a very precise conclusion as to the position which the Magistrate would assign to the first accused; but in the first question which he submits for our opinion he assumes as its basis that the letters were signed by the first accused under the authority of Nobin Chunder Coondoo, and it is on that footing, we think, that the question must be dealt with.

With respect to the remaining accused, the Magistrate has devoted some space to the consideration of the question whether they were all present in Calcutta at the time at which the letters on which the trial is

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based were written. The Magistrate has not indicated in what way he considered that the mere presence of the accused in Calcutta could affect the question of their guilt. He may, perhaps, have regarded it as bearing on the question of knowledge, but as to this he has arrived at no finding. But however this may be, the inquiry whether the members of the partnership were present in Calcutta or absent when the letters were written is, in our opinion, immaterial, their liability depending, not on whether they were present at the writing of the letters, or knew of the writing of them, but, on their being, in contemplation of law, the persons who signed the letters of acknowledgment or refusal to give the receipt.

To revert to the case of the first accused, he is charged, under [332] s. 61 of the Act, with having signed the letters of acknowledgment, which were unquestionably chargeable with duty, without their being duly stamped, and under s. 64 with having refused to give a duly stamped receipt. The latter branch of the charge has, however, as we gather from the order of reference, been dropped by the Magistrate in so far as he is concerned, and properly so, for in order to bring home the charge under s. 64, it must be shown that the person accused had been required under s. 58 to give a receipt, and there is no pretence for saying that, in the case of the first accused, any such requisition had been made. But with respect to the charge under s. 61 the matter is not so clear. The first accused did undoubtedly write the name of the firm at the foot of the letters in question, and what has to be determined is whether, by doing so, he signed these letters in the sense in which the term is employed in the section, which makes it punishable to "sign" otherwise than as a witness, &c. By "signing" here, we take it, is meant (so far as the present question is concerned) the writing of a person's name by himself or by his authority with the intention of authenticating a document as being that of the person whose name is so written. An ordinary agent authorized to sign on behalf of his principal would fall within this description, and consequently we think within the purview of the section, and the circumstance that the letters, that is, the body of them now in question, were written at the dictation of the manager of the firm is not, to our minds, sufficient to distinguish the case of the first accused from that of any other agent if, in fact, he signed the firm's name under the authority of the firm, as appears to have been the case. The agency of the first accused was necessitated by the circumstance that neither his employers nor their manager understood English; but this cannot make any difference. Letters signed by him in the firm's name within the scope of his authority would undoubtedly bind the firm in their transactions with third persons. And he appears to have had authority to affix the firm's name, at all events, to letters dictated to him by the manager of the business as those now in question are found to have been. We are aware that a good deal might, perhaps, be said under the circumstances of this case in support of the contrary view; but, on the whole, we are of opinion that the [333] first accused did sign the letters in question in the sense of s. 61 of the Act, and that he may be properly convicted under that section.

With respect to the members of the firm of Nobin Chunder Coondoo & Co., we are of opinion that they are all liable to punishment both under s. 61 and s. 64 of the Act, provided that in the latter case the requisition under s. 58 of the Act has been established by evidence. We have no doubt that the term "person" in s. 61, as well as in s. 64, includes the members of a trading partnership (see the General Clauses Act (X of 1897),

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s. 3, cl. 39); nor can it, we think, be questioned that the partners in the firm of Nobin Chunder Coondoo & Co. were in contemplation of law the persons who signed the letters acknowledging the receipt of Mr. Lee's cheques, and who refused by the letter of the 8th February 1899 to give him a receipt. The signatures were theirs, and the refusal was theirs, though the hand which actually wrote the letters was that of the first accused ; and having regard to the general scope and intention of the Act, we do not think, as we have already indicated, that the knowledge of these accused enters as an element into the offence with which they are charged.

It is unnecessary that we should say anything as to the charge of abetment preferred against Nobin Chunder Coondoo.

Let the record of the case with the foregoing remarks be sent to the Chief Presidency Magistrate.

D. S.

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27 C. 333 (P.C.) = 27 I.A. 79 = 4 C.W.N. 203 = 2 Bom. L.R. 596 = 7 Sar P.C.J. 686.

PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten, Davey, and Robertson, and Sir Richard Couch.

[*On petition from the Court of the Judicial Commissioner of Oudh.*]

SHANKAR BAKSH (*Plaintiff*) *v.* BULWANT SINGH AND OTHERS (*Defendants*) EX-PARTE SHANKAR BAKSH. [9th December, 1899.]

Privy Council, Practice of—Petition for special leave to appeal—Reasons omitted in order admitting to review—Civil Procedure Code (Act XIV of 1882), s. 626.

With reference to the requirement in s. 626 of the Civil Procedure Code that reasons should be recorded by the Judge granting an order of [334] admission to review, the mere omission to record them was not held a ground for granting special leave to appeal from the order or from the decree, which was subsequently made.

[R., 7 O.C. 345 (348).]

PETITION by the plaintiff for special leave to appeal from an order (30th March 1899) of the Judicial Commissioner, admitting a review from a decree (11th November 1898) of his predecessor in office and for special leave to appeal from a decree (1st April 1899) dismissing his suit made in review of the former decree which had been in the plaintiff's favour.

The question in the suit, in which the above decree of the 11th November 1898 was made between the parties, was whether or not certain plots of land within the plaintiff's talukhdari estate were comprised within the defendants' under-tenure.

The decree of the last-mentioned date was made in favour of the plaintiff by the Judicial Commissioner in concurrence with the Court below.

This decree was admitted to review by his successor in office on the 30th March 1899, and on the 1st April following it was reviewed and reversed by that successor.

The present petition stated that no reasons, such as were required by s. 626 of the Civil Procedure Code, were recorded by the latter for the order admitting to review. It also submitted that there were no reasons for such an order, or for the subsequent reversal of the first decree on appeal,

which was grounded upon the concurrence of the Judicial Commissioner, who first heard the suit, in the decision of the Court of first instance. 1899 DEC. 9.

Mr. *H. Cowell*, in support of the petition, argued that the following were sufficient grounds for the grant of special leave to appeal: *First*, that the successor in the office of Judicial Commissioner had exceeded the authority given by s. 623 of the Civil Procedure Code for the exercise of the power of review. It was well established that the words "any other sufficient reason" did not apply, in a case such as this, to mere difference of opinion as to the balance of evidence between one judicial officer and another; and did not authorize such a review and reversal as had taken place. The section authorized admission to review on such grounds as were specified, and on grounds of a like [335] nature with them; but there was a substantial difference between a review and an appeal. Here there had been no right of appeal. Yet the defendant had been allowed to bring forward his case for rehearing in a way that amounted to allowing an appeal, indirectly, to the successor. Reference was made to the judgment of A. Macpherson, J., in *Roy Meghraj* v. *Beejoy Gobind Burral* (1). *Secondly*, the power of admitting to review could only be exercised where the reasons were recorded; and in the order of 30th March 1899 no reasons had been given.

PRIVY COUNCIL.

27 C. 333 (P.C.) = 27 I.A. 79 = 4 C.W.N. 203 = 2 Bom. L.R. 596 = 7 Sar. P.C.J. 686.

JUDGMENT.

Their Lordships' judgment was, on the 9th December 1899, given by

LORD HOBHOUSE.—Mr. Cowell, their Lordships wish to express in this case a regret that the learned Judge who granted the review should not have put his reasons on record as required by s. 624 of the Code. They think it a matter of importance in the administration of the proceedings of the Court, and it ought to have been done. But their Lordships cannot think it a matter affecting the admission of the appeal in such a way as to induce them to advise Her Majesty to grant an appeal on that ground. It is rather a direction to the Judge how to act when he has decided to grant the application than a condition of granting it. In other respects the case seems to be quite an ordinary dispute between the parties on matters of fact, matters of measurements, payments of revenue, and inferences from them; and as it is under value the rule is, that the final Court of Appeal in India should not be interfered with in its judgment. Their Lordships see no reason for taking it out of the ordinary rule that the judgment of the appellate Court must be final.

Leave refused.

Solicitors for the petitioner: Messrs. *Ranken, Ford, Ford & Chester.*

(1) 1 C. 197.

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[336] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse and Macnaghten, and Sir Richard Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

[*Three appeals consolidated.*]

MONMOHINI DEBI AND ANOTHER (*Plaintiffs*) *v.* R. WATSON & CO. (*Defendants*).

SARNAMOYI DEBI (*Plaintiff*) *v.* R. WATSON & CO. (*Defendants*).

HEMANTA KUMARI DEBI (*Plaintiff*) *v.* R. WATSON & CO. (*Defendants*). [3rd May and 8th July, 1899.]

Accretion—Ownership of alluvial land, again formed after diluvion—Evidence of the identity of the sites—Thak and survey maps.

Riparian owners disputed the right of property in plots of alluvial land formed by the action of the current at a place where similar land, within a revenue mehal, bounded on one side by a river had been carried away by diluvion some years before. The claimants in these three separate suits, each claiming possession, had title as zemindars to the formerly existing plots. The new formations now claimed were alleged to have been thrown up on the sites of the former plots, and to be part of the claimants' several estates. These estates were represented in a thakbast map, made before the diluvion, and showing what had been mapped as the boundary lines.

On the re-appearance of the land a survey map was made. Between this and the thak map there were discrepancies as to the boundary lines. There were also differences between the thak and the state of the locality as existing when, for the purposes of this suit, a local investigation was made by an Amin appointed by the Court of first instance.

Held, that it was not a necessary part of the claimants' cases that there should be a complete agreement between the above maps, or that the thak should be shown to accurately represent the former plots. To ascertain the precise boundaries would require more accuracy than could be well expected in a thak map; and the identity of the sites of the re formed plots with those of the plots formerly existing had, in the judgment of their Lordships, been established by evidence reasonably sufficient.

CONSOLIDATED appeals from three decrees (20th August 1895) of the High Court, reversing three decrees (3rd August 1893) of the Subordinate Judge of Murshedabad.

The alluvial lands in dispute were a number of chuks, or defined plots, on a chur comprehended in a mauza named Diar Shibnagar. These, formed by alluvion, were said by the claimants to [337] be on the sites of formerly existing plots, demarcated and numbered in the Collectorate. The former plots had been washed away. The proprietary possession of the new was claimed on the averment that they belonged to the several revenue-paying estates of the three sets of plaintiffs above named, who all made similar statements as to their zemindari rights of property in them. The evidence on both sides was the same in all the three suits which were heard together.

Diar Shibnagar was made up of six separate estates assessed to the revenue, separately owned, and numbered. It was bounded on the east by the river Pudma.

Among other defences the defendants set up that they held a putni tenure granted to them by a zemindar in mauza Shibnagar which covered part of the lands in dispute, and certain jotes, or holdings which comprehended other parts. That the jotes or tenancies entitled them to

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be treated as ryots within the Bengal Tenancy Act (VIII of 1885) and that they could only be evicted on due notice. They also contended that the plaintiffs could only sue upon the averment of a joint and undivided right according to their fractional shares in an estate, or estates, and could not sue for separate possession.

But the only substantial question raised in all the suits was whether the sites of the newly formed plots had been, or could be, sufficiently identified with the sites of the plots existing in Diar Shibnagar before the diluvion which commenced in 1853.

Earlier in 1853 the thak map referred to in these proceedings was made, showing the shares held in the mauza, and the alluvial plots appertaining to each were indicated, the rest of the alluvial area being held jointly in fractional shares. In that year, the course of the Pudma began to wash away the land of Diar Shibnagar, and before 1869 the whole had been submerged. In 1869 re-appearance of the land set in, and after another but less encroachment of the river, the land in 1880 was again above the river's level as before. A survey map was then made by Kamal Chunder Dutt, under orders of the revenue authorities. In May 1883 some of the claimants sued the Government for joint possession of the reformed land, alleging that it had been wrongly taken by the revenue officers, on its re-appearance. They obtained [338] a decree for part of the land by consent. In 1891 a large part of the newly formed land was under the cultivation which the defendants had established thereon. In October 1891 the present plaintiffs forcibly took possession. But the defendants, under s. 9 of the Specific Relief Act, 1877, obtained a decree for possession, on which they entered on the 5th April 1892.

This was followed by the present claimants' suits on the 7th May 1892.

The Subordinate Judge, Babu Kalicharan Ghosal, gave one judgment in the three suits. He had deputed an Amin to make a local investigation, under s. 392 of the Civil Procedure Code. He was satisfied that this had been properly conducted, and concluded that the identity of the sites of the new and the old plots had been fairly established. He annexed the map, which the Amin had made, to his decree, which was in favour of the plaintiffs.

The defendants appealed to the High Court. The Judges of a Divisional Bench (PETHERAM, C. J., and BEVERLEY, J.) were of opinion that, although it was very probable that the Amin had been nearly successful in ascertaining where the old chuks, or plots, were, still it was only a probability. They considered this to be altogether insufficient to entitle the several plaintiffs to obtain *khas* possession of lands, which might in reality belong to the defendants, or to one or other of the owners of land in Diar Shibnagar. They, further, were of opinion that evidence indicated that all the zemindars claiming alluvial land in that mauza had been receiving the profits of their estates in the main or original land of Shibnagar, according to fractional shares. The suit brought against the Government was a joint one, and would probably have failed if it had been asserted that each zemindar, or group of zemindars, was separately interested in an ascertained portion of the chur, and entitled to separate possession. The High Court also were unable to find that the plots claimed were in the same position as those represented to belong to the several claimants in the thak map of 1853. They decided, accordingly, that the evidence of identity of site was insufficient, and dismissed the suit.

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[339] Sir *W. H. Rattigan*, Q C., and Mr. *C. W. Arathoon*, for the appellants.—Our cases were such that the High Court should have acted upon them as supported by sufficient evidence, instead of reversing the decree of the first Court which was based upon reasonably adequate proofs. Especially when the latter were contrasted with a defence that was not supported by substantial facts. If the case for the appellants had not been proved to demonstration by maps in perfect agreement, at all events it was more reasonably probable that the plots now claimed had been formed upon the old sites than that they had not been formed there; regard being also had to what a thak was expected to be in comparison with a survey map. The thak bust was, and had been defined to be, "the laying down the boundary of estates, fixing their limits" preparatory to a professional survey, and practically such accuracy was not to be expected in it as in the survey, which was final in the Collectorate. The maps were then examined with a view to showing that the plots as laid down in the survey map verified the Amin's map, annexed to the decree. He had reported that such discrepancies as existed between the thak and survey map were such as frequently occurred, the survey map in this case agreeing with the actual state of the ground. This had induced the Subordinate Judge to amend the Amin's map annexed to his decree, to make it correspond with the survey map, and to recognize it as correct with that amendment. It was submitted that no sufficient reason had been shown by the High Court for reversing the decree of the first Court.

Mr. *J. Jardine*, Q.C., and Mr. *J. H. A. Branson*, for the respondents.—It being necessary for the plaintiffs to prove that the lands claimed were upon the identical sites with the land which had been lost by the diluvion of 1853, they had failed to give the proof which they had attempted to adduce. They should have established the identity of the sites of the new plots with the sites of the old according to the thak map of that year. The High Court had correctly decided that for the plaintiffs to succeed they had to affirm two propositions. They should have shown that the estates in Diar Shibnagar were held by the owners in defined areas, and not merely that the estates [340] were held by receipt of some fractional shares of profits of entire zemindaris, and also they should have shown the possibility of the plots newly formed being assigned to the same position as the old plots on the thak map of 1853. As the plaintiffs had failed to do this they had failed to prove their title to the lands claimed.

Sir *W. Rattigan*, Q. C., replied.

JUDGMENT.

Afterwards on the 8th July 1899 their Lordships' judgment was delivered by

SIR R. COUCH.—These are consolidated appeals in suits brought by the several appellants and others against the respondents to recover possession of lands in the district of Moorshedabad known as mouzah Diar Shibnagar. The mouzah consisted of six touzis or revenue-paying estates in shares numbered 405, 268, 269, 270, 271, and 1580, the last number not being included in these suits. The lands in dispute were a large number of ascertained chucks or demarcated plots of land belonging to these several estates and shown on the thak map made on a preliminary survey of the mouzah by the Government for revenue purposes, those which belonged to the estate No. 270 being coloured red, to the estate No. 271 blue, and

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to Nos. 405, 268 and 269 uncoloured, and the chucks being held by the owners of the estate in fractional shares as between themselves. In 1853 the river Pudma which adjoined the mouzah began to diluviate its lands, and at some time between that date and 1869 the whole of the lands in dispute in these suits had become diluviated. In 1869 a portion of them had been reformed and a survey was made of it for the purpose of assessing revenue. Shortly afterwards this portion was again diluviated, but by 1880 it had been again reformed and was surveyed on behalf of the revenue authorities. In May 1883 the owners of 405 and 270 brought a suit against the Government and the owners of the other estates to recover joint possession of the reformed land on the ground that it was a portion of their estates and had been wrongfully taken possession of by the Government. The owners of 268 and 271 were at first made defendants, but were afterwards made plaintiffs instead of defendants. In 1886 the plaintiffs having come to terms with the Government there was a judgment by consent in their favour **[341]** as to a portion of the land claimed, and they were allowed to withdraw the suit as to the remainder with liberty to bring a fresh suit.

In 1891 a large part of the reformed land, which then had an area about two miles in length and one in breadth, had become valuable and 600 bighas of it had been sown by the respondents with indigo and wheat and scattered plots were being cultivated by ryots from the other lands of the mouzah. The servants of the respondents having in October 1891, whilst they were reaping indigo, been attacked by persons at the instigation of the appellants and driven off the newly formed lands, the respondents brought a suit under the Specific Relief Act to recover possession and obtained a decree under which they were in April 1892 put in possession by the Court of the whole of the newly-formed lands. Thereupon the present suits were brought and were tried together.

In two of the suits, 380 and 381 of 1892, the issue framed was whether the lands in suit fell within the plaintiff's alleged chuck No. 60, &c., and No. 58, &c. In the third suit 437 of 1892 the issue was in a different form,—whether the lands in suit fell within the residue of No. 34 of the thak and survey of 1853; and, if so, were the plaintiffs proprietors of the same? In the former two suits there was a formal admission by the defendants' pleader that the chucks as numbered belonged to the plaintiffs. In the latter suit it does not appear to have been disputed that the residue of No. 34 belonged to the plaintiffs, if the issue raised that question. The real question in all three suits is, whether the sites of the reformed lands claimed are identical with the sites of the lands which belonged to the appellants before the diluviation. According to the practice of the Indian Courts in such cases from a very early period a commission was issued under the provisions of the Civil Procedure Code to the Civil Court Amin to make a local investigation and to report thereon to the Court. He began his proceedings on the 21st December 1892, and on the 27th May 1893 he made his report with a map annexed to it. The investigation had occupied him 27 days. The report with the evidence which he took is in the record, and his investigation appears to have been very carefully made in the presence of the representatives of the parties. In **[342]** the report he says that "the land-marks given in the thak map (preliminary survey) correspond with the land-marks given in the survey (the final) map and those existing on the boundaries in the locality; but when the thak is compared throughout from any one of the aforesaid

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marks or points, the thak lines do not agree in length with the survey lines and ridges in the locality. Evidence has been taken with regard to the boundaries pointed out on behalf of the plaintiff." After referring to this evidence the report says, "such discrepancies are generally found in the boundary lines of the survey map, therefore this should not be taken into account." After noticing some discrepancies between the thak boundaries and the state of the locality, the Amin says "such faults occur in the thak in several cases and I have found such faults in course of several investigations." In conclusion he says: "in places where the thak and survey map do not agree with each other it is proper to act according to the survey, and specially, as in this case, the survey map corresponds with the locality, I determined the boundary line according to the survey and, having plotted the thak chucks according to it, I have determined the disputed land."

The Subordinate Judge, who had before him the thak field book which is in the record of the appeal in the suit 437 of 1892 as well as the thak map, agrees with the Amin that when the thak and survey maps disagreed the survey map ought to be adopted for fixing the boundary line, and after discussing the evidence in the case decided in favour of the plaintiffs in the three suits for part of the claim in each of them and marked on the Amin's map by lines described in the judgment the lands which he found to belong to them respectively. Finding other issues also for them he made a decree in each of the suits in favour of the plaintiffs, the Amin's maps being ordered to form part of it. The present respondents appealed to the High Court, which Court (consisting of the Chief Justice and another Judge) reversed the decrees of the Subordinate Judge and dismissed the plaintiffs' suits with costs. Taking the suit 380 of 1892 and saying that, if that suit fails the other two must also fail, the learned Judges in their judgment say they think the plaintiffs had failed to make out a *prima facie* case; that in order to do so the plaintiffs must prove that **[343]** it was then possible to find and demarcate upon the reformed land on the bank of the Pudma plots and chucks of land which occupy precisely the same position on the surface of the earth as the plots or chucks which are represented by the colour red on the thak map of 1853; that "this must depend upon whether the thak map is an accurate representation of the area and boundaries of the mouzah as it existed in 1853, and whether the materials then existed to enable a skilled Amin to lay down upon that map an accurate map of the area and boundaries of the mouzah in its present condition;" that there were inaccuracies in the thak map and the survey which the Amin and the Subordinate Judge had rectified; that if the thak map were accurate it would no doubt be possible to find from it the red enclosures upon the land, "but as soon as it appears as it does here from the plaintiff's own evidence that the thak map is inaccurate, it must follow that any attempt to place the fields shown upon it upon the present surface of the land can be nothing more than a guess, and thus, though it is very probable that the Amin has been nearly successful in ascertaining where the old chucks were, still it is nothing more than a probability, which is altogether insufficient to entitle the plaintiffs to recover khas possession of land which may belong to the defendants or to the owners of either of the other estates." Their Lordships are unable to agree in this reasoning. It requires an amount of accuracy in a thak map which cannot reasonably be expected in it. If the learned Judges are right in their view of the accuracy which is necessary there would be very few cases in which the owner of

diluviated land would be able to recover possession of it when it was reformed. In most cases the persons who were alert in going upon the land and making any kind of cultivation of it would acquire a title to it. Their Lordships are of opinion that there was sufficient evidence on the part of the plaintiffs to entitle them to recover possession of the land, and they will humbly advise Her Majesty to reverse the decrees of the High Court and to order the appeals to it to be dismissed with costs, thereby affirming the decrees of the Subordinate Judge. The respondents will pay the costs of the present appeals, but not including the costs of the petition to have the appeals [344] consolidated or of the petition of the appellants heard on the 25th day of April 1899 to have the hearing of the appeals postponed. The respondents' costs of opposing both these petitions are to be paid by the appellants.

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Appeals allowed.

Solicitors for the appellants : Messrs. *T. L. Wilson & Co.*
Solicitors for the respondents : Messrs. *Freshfields & Williams.*

C. B.

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PRIVY COUNCIL.

PRESENT :

Lord Watson, Lord Hobhouse, Sir Richard Couch and Sir Edward Fry.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

BALBHADDAR SINGH (*Plaintiff*) v. SHEO NARAIN SINGH (*Defendant*). [30th June and 22nd July, 1899.]

Oudh Estates Act (I *of* 1869)—*Succession to a talukhdari—Effect of declaration by holder as to who should be his heir.*

The Official enquiries made of talukhdars at an early period of British administration, as to who were to be their successors, were not intended to derogate from the rights of talukhdars in their heritable and transferable estates.

To such an enquiry an answer in 1862 made by a sanad-holding talukhdar, since deceased, who was entered in Lists I and II (under the Oudh Estates Act, 1869), stated that she appointed to be her heir the father of the present plaintiff, appellant. The father, however, died before the talukhdar and the son now claimed that this nomination amounted to a gift of the talukhdari estate, subject to a trust for the life of the then talukhdar.

Held, that the answer of 1862 did not operate to confer any estate upon the person named.

[R., 13 C.W.N. 291 (295).]

APPEAL from a decree (30th June 1893), affirming a decree (29th September 1890) of the District Judge of Rae Bareli, who dismissed the suit.

The plaintiff, appellant, and the defendant, respondent, were descendants, the one in the fifth degree and the other in the fourth, from an ancestor common to both. The plaintiff claimed the proprietary right as talukhdar of Gaura in the Rae Bâreli District, alleging himself to be, by more than one title, the lawful successor of the last holder, who was the late Thakurain Achal Kunwar, a widow, to whom her deceased husband, Bhopal Singh, [345] another descendant from the same common ancestor with the present parties, has transferred the entire estate of Gaura. Bhopal Singh died in December 1858, having executed a transfer of the Gaura talukhdari to his said wife.

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On the 19th February 1859 the summary settlement was made with her. On the 26th July 1862 she received a sanad from the authorities, and afterwards her name, after the passing of the Oudh Estates Act, 1869, was entered in the Lists I and II. Thus the estate was established as devolving upon a single heir, within s. 8, para. (1) of that act. In November 1887 she died. The defendant, respondent, the actual holder in possession, alleged a title under the will of the late Thakurain. Both the Courts below dismissed the suit. The substantial question between the parties to this appeal was as to the effect of her answer to an enquiry of her by the Deputy Commissioner as to who would be her successor. This answer was contained in two documents to the same purport, one of the 20th April 1862, and the other dated on the following day.

The appellant alleged that by their effect his father, Sheopal Singh, had received from the Thakurain a gift of the inheritance, she having thereafter retained only the estate in the talukh for her life, the remainder having passed away from her to Sheopal, inheritable by his son after him. Sheopal had, however, died long before the Thakurain, in 1867. Besides the displacing of testamentary disposition, other grounds of claim had been negatived on the facts. Both Courts had on the facts found against an alleged adoption of Sheopal under authority to the Thakurain, and against a custom of succession in the direct male line of primogeniture, under which it was sought below to bring him.

The suit having been dismissed with costs in the Court of the Judicial Commissioner, the plaintiff now appealed.

Mr. *C. W. Arathoon* (Mr. *W. H. Apjohn*, Q.C., with him), for the appellant.—The effect of the nomination of Sheopal Singh was to confer upon him a proprietary interest in the Gaura estate, which vested in him, and was inherited by his son. The Thakurain Achal Kunwar had, by the petitions delivered in answer to the enquiry of the authorities in 1862, secured to **[346]** Sheopal Singh an estate of inheritance. She termed the second document a "deed of inheritance." This was to be subject to her own interest for life. There was a gift to Sheopal Singh which should receive effect, and his son, notwithstanding his father's death in the life-time of Achal Kunwar, could claim to have inherited the talukhdari.

In reference to the effect of answers to the questions put to talukhdars in earlier days as to who would be their successors, were mentioned *Hurpurshad* v. *Sheodial* (1), *Haidar Ali* v. *Tasadduk Rasul Khan* (2).

Mr. *A. Cohen*, Q.C., Mr. *J. D. Mayne*, Mr. *L. De Gruyther*, for the respondent were not called upon.

JUDGMENT.

Afterwards, on the 22nd July 1899, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The property in dispute is the taluk of Gaura, to which the Courts in Oudh have held the respondent to be entitled. The last holder was a lady named Achal Kunwar, widow of Bhopal Singh, who died in December 1858. She was recognised by the Government, and her title was established by sanad granted in July 1862. The taluk was entered in Lists I and II as devolving on a single heir, and not in List III. She died in November 1887. The Collector placed the respondent in possession as being either heir or devisee; upon which the present suit was brought. It lies, therefore, upon the plaintiff, now appellant, to show that he has the better title.

(1) 3 I. A. 259. (2) 18 C. 1 = 17 I. A. 82.

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He has attempted to do that in more than one way. He alleges that Achal Kunwar adopted his father Sheopal Singh; and from a document which will be examined presently it may be conjectured that she did at one time contemplate such an adoption; but no sufficient evidence was brought by the plaintiff to show that it was effected, and both Courts have held that it was not. He further claimed to be the heir-at-law of Achal Kunwar, tracing his title through her husband Bhopal by lineal primogeniture; but as the taluk was entered in List II and not [347] in List III, the single heir is, in the absence of any family custom to the contrary, to be ascertained by the rules of the Hindu Common Law; and the appellant is more remote in blood than the respondent. The only serious question raised at the Bar relates to the meaning of a document marked as Ex. A2 which the appellant contends to have been a gift of the estate to his father Sheopal.

Before the issue of the sanad, enquiries, such as other cases have made familiar to us, were made by executive officers to ascertain the views of the Thakurain concerning the succession to her estate. After some uncertainties and vacillations, which the officers evidently attributed to intrigues in her household, but which are not now material to detail, the Thakurain's views were finally stated in a petition, dated 20th April 1862, marked A13. It runs as follows:—

"Your petitioner was much honoured by service on her of your order dated 26th March 1862, inquiring as to the heir-apparent to the estate. Having been thus informed of the order, your petitioner begs to submit that since the petitioner is issueless, she appoints Sheopal Singh to be her heir. She shall be the proprietor during her lifetime, and shall (herself) manage the estate affairs, and after her death, Sheopal Singh shall become the proprietor (*malik*) of the estate. Therefore during her lifetime she declares Sheopal Singh to be her heir, and this application having been clearly worded is submitted by way of a deed of inheritance in order that it may be a sanad and be of use when required.

(Sd.) ACHAL KUNWAR,
Talukdar of Gaura."

Exhibit A2 is a document, dated 21st April 1862, and purporting to be a letter from the Thakurain to Kamta, the father of Sheopal.

"From Thakurain Achal Kunwar, to Srish Sri Maharaj Koer Kamta Parshad.

May you live long!

"I (Thakurain Achal Kunwar) offer my blessing to you, and pray for the welfare of both sides. I request you to give Sheopal Singh (may he live long!) to me, please give him to me, be obedient to me, and carry out my orders till I live; during my lifetime I will be the proprietor (Thakur). I make Sheopal Singh my heir and proprietor of this estate, land, debts, and wealth, after me. I invoke the Government, brotherhood, all good men, [348] and spiritual guide. These shall punish me, if I act otherwise than in the manner described. I make Sheopal Singh (may he live long!) proprietor and landlord (Thakur) of this Raj the Gaura (estate) after me. The witnesses hereof are Binda Parshad, Kanungo; second witness, Majlis Rae, Kanungo; third witness, Thakur Bakhsh Singh of Sotha. Dated Baisakh Badi 7th, 1269 Fasli, 1919 Sambat.

(Sd.) THAKURAIN ACHAL KUNWAR."

"The *sanad* executed by me is correct.

(Seal of Thakurain
Achal Kunwar.")

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It was put in by the plaintiff and admitted in evidence by the District Judge. The Court of the Judicial Commissioner thought it not proved. Without discussing that point, the argument has proceeded here on the footing that the document is genuine.

What then is its effect? It would not suffice for the plaintiff to show that it is a testamentary instrument, because Sheopal died in 1867, and it could not take effect in his favour. The plaintiff, therefore, contends that it operated to transfer the estate, and that by it the Thakurain's absolute interest became an estate for life with remainder to Sheopal, or became burdened with a trust having the same effect.

This is not one of the cases in which a sanad has been obtained in consequence of some promise by the grantee. For all that appears the Government were quite indifferent as between Sheopal and other members of the family. The Thakurain's petition (A13) was not founded on any valuable consideration moving to her. In answer to an enquiry who was heir apparent to the estate, she says she appoints Sheopal to be her heir. Though she speaks of her petition as a sanad and a deed of inheritance, it is highly improbable that she had in her mind any idea so novel to her people as the idea of turning her inheritance into an estate for life with remainder to a collateral relative. Doubtless her idea was that she was simply pointing out who should take through her by inheritance; and if she had then died her nominee would have been quietly installed. These official inquiries as to successors had reference to the critical state of the country, and it was not their object to derogate from the hereditary transferable right which had been promised to [349] the talukdars, and which was expressed in the sanad soon afterwards granted to this lady.

It seems to their Lordships that, apart from the idea of adoption which never bore fruit, the letter A2 is to the same effect with the declaration of the day before. In effect the Thakurain informs Kamta of her inclinations towards his son—a very natural thing for her to do, when, after some inconsistent expressions of view and some family controversy, she had finally made known her intentions to the Government. But there was no contract with Kamta and no consideration moving from him. The Officiating Judicial Commissioner expresses himself thus.

"When it is said, 'I make Sheopal Singh the owner (or the owner and heir) of this estate after my death,' the only reasonable interpretation to be put on the words is that the writer was appointing Sheopal Singh to be heir in succession to herself. To find in this plain language any intention on the writer's part to declare herself a mere trustee for her lifetime of the estate on behalf of Sheopal Singh would be impossible without putting on the words used an interpretation which would not only be unnatural and forced, but would certainly never have suggested itself to Mussammat Achal Kunwar. There can be no doubt that if it had been suggested to any one in Mussammat Achal Kunwar's position that such an interpretation could be put on the document, she would have repudiated it without hesitation. The necessity of dealing very cautiously with documents executed by ladies in this country and the danger of ascribing to their language any other meaning than that which they themselves would attach to them is obvious enough. Now, in this instance, we have undisputed evidence of Mussammat Achal Kunwar's wishes on this point only some 24 hours before this document is said to have been executed; and that too in a document which she placed in the

hands of public officials as a final declaration of her wishes with regard to Sheopal Singh."

These remarks express also the view taken by the other Judges below, and as their Lordships concur in them they must hold that the appeal is groundless, and should be dismissed. They will humbly advise Her Majesty in accordance with this opinion, and the appellant must pay the costs of this appeal.

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Appeal dismissed.

Solicitors for the appellant: Messrs *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Watkins & Lempriere.*

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27 C. 350.

[350] TESTAMENTARY JURISDICTION.

Before Mr. Justice Sale.

IN THE GOODS OF AMRITA LAL MULLICK (*Deceased*).
[8th February, 1900.]

Probate—Minor—Special citation—Probate and Administration Act (*V of* 1881), *ss.* 50, 83—*Procedure—Service of Summons—Code of Civil Procedure* (*Act XIV. of* 1882), *ss.* 443, 647.

Where executors applied for probate and there was living a minor widow entitled to maintenance and residence under the will:

Held, that a special citation should issue upon the widow and be served personally on her and on her father with whom she resided.

AN application was made for probate of the will of the deceased by two of his brothers appointed executors. The testator, who died without issue, left him surviving a childless widow, at the date of this application, a minor of the age of ten years. She resided sometimes with the petitioner and sometimes with her father. The testator by his will provided for the maintenance and residence of his widow, and directed that in the event of his dying without leaving a male child, the whole of his estate should go to the petitioners and his three other brothers in equal shares. The petition now asked for a special citation to issue to the widow of the testator calling upon her, if she claim any interest in the estate of the deceased, to come and see the proceedings before grant of the probate also asked for in the petition.

Mr. *J. G. Woodroffe*, for the petitioners.—Except for the prayer for issue of a special citation on the widow the application is in the usual form. On an application for probate by executors citations are not ordinarily asked for. Here, however, the widow is a minor of ten years of age, and the executors on her attaining majority may be called upon to prove the will in solemn form, and the attesting witnesses and other necessary evidence may not be procurable. Want of citation on the proper parties has been held to be a ground for revocation of probate. In *Rebells* v. *Rebells* (1) it was held that the proper course is to serve the [351] minor with notice and to have a guardian *ad litem* appointed. There are no special provisions in the Code for service on minors: the service should be personal and in the usual manner. The father of the minor, with whom she resides, may also be served. We will make a subsequent application for the appointment of a guardian *ad litem* of the minor. If the widow appears to oppose

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(1) 2 C.W.N. 100.

1900 FEB. 8. — TESTAMENTARY JURISDICTION. — 27 C. 350.

the grant, the case will proceed as a contentious cause under s. 83 of the Probate and Administration Act. If the widow does not appear on proof of service of citation, the will may be proved summarily. Proof in solemn form *per testes* will not be then required hereafter. *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1).

ORDER.

SALE, J.—I think you have made out a case for the issue of a special citation. I order that a special citation do issue to the widow, and direct that it be served personally on her and also on her father with whom she occasionally resides.

Attorneys for the petitioners : Messrs. *Morgan & Co.*

C. E. G.

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27 C. 351=4 C.W.N. 610.

INSOLVENCY JURISDICTION.

Before Mr. Justice Sale.

W. E. HOWATSON *v.* W. E. DURRANT.* [22nd January, 1900.]

Insolvency—Vesting order—Civil Procedure Code (Act XIV of 1882), *s.* 295—*Rights created by s.* 295 *not affected by Insolvency—Insolvent Act* (11 *&* 12 *Vict., ch.* XXI), *s.* 49.

An order under s. 295 of the Civil Procedure Code affects only interest existing at the time.

The insolvency of the debtor introduces a new state of things from the date of the insolvency, but as regards sums accrued due prior to the date of the insolvency the order under s. 295 creates rights, which are not affected by the insolvency.

Soobul Chunder Law v. *Russick Lall Mitter* (2) cited.

THE plaintiff, who is the creditor of the defendant, obtained a decree, and after various proceedings an order, dated 8th September [352] 1898, under s. 295 of the Code of Civil Procedure by which it was ordered that certain payments be made out of the fund in Court representing realizations made in execution of decrees, and that the Registrar should enquire and report who were the creditors of the judgment-debtor entitled to payment out of the fund in Court and be at liberty to include in his report any further sum of money which might be paid into Court to the credit of this suit up to the date of his report, and the order further directed that the balance of the fund after payment of the amounts already mentioned be applied in payment rateably to persons found by the report entitled to a distributive share therein in the proportion indicated in the report.

On 1st February 1899 the defendant applied to the Court to be adjudged an insolvent, and on the same day an order was made vesting all the immoveable and moveable property and effects belonging to the insolvent in the Official Assignee. The Registrar's report was still pending, and it was found that at this time there was in Court from the salary accruing due to the defendant to the credit of the suit a sum of Rs. 7,094-14-2. The creditors who claimed to share in this sum were the same creditors whose names were set out in the schedule to the petition of the insolvent. This application was now made by the Official Assignee by means of a rule

* Original Civil Jurisdiction.

(1) 11 C. 492. (2) 15 C. 202.

asking that the plaintiff and the other creditors may be directed to withdraw their attachments attaching a moiety of the monthly salary of the defendant, and for an injunction restraining them from executing or attempting to execute their decrees against the insolvent, and a declaration that the plaintiff and the other creditors have no right to be paid any portion of the sum of Rs. 7,094-14-2, at present standing to the credit of the suit, and an order on the Comptroller-General to pay over the sum of Rs. 7,094-14-2 to the Official Assignee and for other relief.

Mr. *Hyde* appeared for the Official Assignee.
Mr. *Sinha* appeared for the plaintiff.
Mr. *Zorab* appeared for the defendants, Tichoo and Gangoo.

ORDER.

SALE, J.—The question in this rule is as to the effect of the insolvency of the defendant under the vesting order of the 1st of February 1899, on the previous order made in this suit on the 8th of September 1898.

[353] The plaintiff is the creditor of the defendant. He obtained a decree in this suit, and after various proceedings he obtained on the 8th of September 1898, an order under s. 295 of the Civil Procedure Code, whereby, after directing certain payments to be made out of the fund in Court representing realizations made in execution of decrees, it was directed that the Registrar should proceed to enquire and report as to who were the creditors of the judgment-debtor entitled to payment out of the fund in Court, and that for the purpose of that enquiry the Registrar was to be at liberty to include in his report any further sum or sums of money which may be paid into Court to the credit of this suit up to the date of such report, and then the order proceeded to direct that the balance of the fund, after payment of the amounts already mentioned, be applied in payment rateably to persons found by the report entitled to a distributive share therein in the proportion indicated in the report. Now that is an order of a character frequently made by this Court under s. 295, and the object is to provide for rateable distribution among such of the creditors of the judgment-debtor as shall be entitled to payment under s. 295. It has certainly always been the practice of this Court to regard an order of this sort as an order, not merely for an enquiry, but also for payment of the sums found payable upon the enquiry. I think that is the way in which the order should be read. But so reading the order, it affects only interests existing at the time. But the insolvency of the defendant introduces a new interest and a different question arises.

Now upon the insolvency of the defendant, the whole estate of the insolvent vested under s. 4 of the Insolvent Act in the Official Assignee, and the Official Assignee became empowered to administer the estate of the insolvent for the benefit of the general body of creditors. The estate so to be administered is the estate of the insolvent subject to any rights, equitable or otherwise, which were existing at the date of the insolvency in favour of third persons. I think, therefore, that the operation of the order of the 8th September must be restricted to the period previous to the date of the vesting order.

It is clear that the Official Assignee is entitled to administer [354] all sums representing the salary of the judgment-debtor accrued, or accruing due to him subsequent to the date of his insolvency, but as regards salary which had accrued due to the judgment-debtor prior to the insolvency, the

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order of 8th September 1898 has created rights which are not affected by the insolvency.

I think that this view is in no way opposed to the principle explained by this Court, in the case of *Subul Chunder Law* v. *Russick Lall Mitter* (1). That is a case which deals only with the rights of a judgment-creditor under an attachment made before the decree for the administration of the judgment-debtor's estate. It decides that an attachment does not create in favour of the attaching creditor any interest in or charge upon the property as against other creditors, and the principle laid down is that under an administration decree the whole of the unrealized assets of a deceased debtor are divisible among the general body of creditors. In my opinion, so much of the fund in Court as represents salary accrued due prior to the insolvency must, under the order of the 8th of September, be treated as realized assets, and as such does not fall within the principle of the decision, which has been cited. The Official Assignee is, I think, entitled under s. 49 of the Insolvent Act to apply to this Court in the suit in which the order of the 8th September is made, to have the operation and effect of that order restricted in the manner already indicated. I think the rule may be made absolute to that extent. The Official Assignee and the judgment-creditors, who have appeared, are entitled to their costs payable out of the balance of the fund after satisfying the payments directed by the order of the 8th of September.

Attorney for the Official Assignee: Mr. *Fink*.

Attorneys for the plaintiff: Messrs. *N. C. Bural & Co.*

Attorneys for the defendants: Messrs. *Dignam & Co.*

C. E. G.

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27 C. 355.

[355] ORIGINAL CIVIL.

Before Mr. Justice Sale.

BENODE LALL ROY AND OTHERS *v.* BUSSUNTO KUMARI DEBI.*
[11th January, 1900.]

Practice—Cases to be entered in the list of suits for liquidated claims—Rule 281 (*H.C.O.J.*) *—Removal of cases improperly entered in that list—Rule* 284*—Ordinary mortgage suit.*

Held, that the practice of the Court having been for many years to place ordinary mortgage suits on the list of suits for liquidated claims in the view that the incidental relief sought in such suits did not prevent them from being regarded as suits in which the claim was in substance a claim only for a liquidated demand in money, the practice should be adhered to.

Held, also, that when a suit is transferred from the general list of causes (at the instance of the plaintiff) it is desirable that this should be done on notice to the defendant so that he may not be taken by surprise.

THE facts of the case are shortly these: On the 2nd of June 1889 the plaintiffs instituted this suit on the basis of a mortgage suit against the defendant for an order that an account might be taken as to the amount due to the plaintiffs for principal and interest on three several indentures of mortgage and further charge and for payment of the same, and that in default of such payment for an order that the mortgaged premises might

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* Original Civil Suit No. 411 of 1899.

(1) 15 C. 202.

be sold, and the proceeds of such sale be applied for payment of the amount that might be found due to the plaintiffs, and in case of deficiency the said defendant might be ordered to pay the same, and for costs of this suit as between attorney and client, and for such further and other reliefs, &c. On or about the 22nd of July 1899, the defendant filed her written statement in this suit taking various pleas of defence. This case, which had been originally placed in the general list of causes, was transferred from such list to the general list of suits for liquidated claims; on the case appearing in the printed board on the general list of liquidated claims, the defendant made this application *for an order that this suit be transferred from the general list of suits for liquidated claims to the general list of causes.*

[356] Mr. *A. Chaudhuri*, for the defendant.—This suit has been improperly entered in the list of suits for liquidated claims. It remained on the general list of causes for a long time, but was at the instance of the plaintiff and without notice to the defendant transferred to the other list. No doubt the practice of this Court has generally been to treat ordinary mortgage suits as suits for liquidated claims, but it is submitted that they have been wrongly so treated, and some Judges have questioned the propriety of the practice. There is no definition to be found in the Rules of this Court as to what is a liquidated demand. But see order 3, rule 6, under the Judicature Acts, which defines the suits which can be treated as such. It will be found that in England the definition has been enlarged from time to time to include various kinds of suits, but here we have never defined the term, nor have there been any decisions reported dealing with the matter. See the judgment of North, J., in *Imbert-Terry* v. *Carver* (1), where it was held that a writ which claims foreclosure or sale and a receiver is not a suit to recover a debt or liquidated demand. Here the term "liquidated demand" has a more restricted meaning than it has under the rules framed upon the Judicature Act. In mortgage suits, as in the present case, the usual prayers are for account and sale.

In this case more has to be done. A trust deed, in favour of the defendant, has to be construed and the rights of the defendant thereunder ascertained, to determine if she could deal with the property purported to have been mortgaged. Under the Transfer of Property Act, all persons having an interest in the property are necessary parties, and to prevent multiplicity of suits their rights have to be adjudicated upon, and such a suit cannot be treated as a liquidated claim. In the case of *Roghunath Misser* (2), which was also a mortgage suit, this Court considered it was not a liquidated demand, because the plaintiff sought to bind the son of a Mitakshara father for his dealings with the joint-estate.

Mr. *S. P. Sinha*, for the plaintiffs.—In the case of Roghunath Misser the plaintiff asked for a declaration that the sons were [357] bound by the acts of their father. There is no such declaration sought for in the present suit. The practice has been to treat ordinary mortgage suits as liquidated claims in this Court. All that can be sold in this suit is the interest of the parties executing the mortgage.

ORDER.

SALE, J.—The question whether this suit is rightly on the list of suits for liquidated claims depends upon whether it is an ordinary mortgage suit. It is contended that it does not come within the terms of rule 281, inasmuch as it is not a suit in which the claim is only for a liquidated

(1) (1887) L. R. 34 Ch. D. 506. (2) Unreported.

1900 JAN. 11. — ORIGINAL CIVIL. — 27 C. 355.

demand in money. It has been the practice for many years to place ordinary mortgage suits on the list of suits for liquidated claims, in order that they may be expeditiously disposed of, and the view held has been that the incidental relief sought in such suits did not prevent them from being regarded as suits in which the claim was in substance a claim only for a liquidated demand in money. This is what I have said on previous occasions when the same question has been raised, and other Judges have said the same thing. This practice should I think be adhered to. The question then is, is this an ordinary mortgage suit? To answer this question it is necessary to look at the plaint and the relief sought. The plaint is framed as in ordinary mortgage suits. The relief sought is just the usual mortgage relief. No declaration of title is sought, nor any equitable relief of an unusual or special character. The questions arising in the suit are those appearing on the face of the deed itself, and no cause of action is introduced other than that which is based on the mortgage itself. It is not at present necessary to consider whether the amendment, which has been made in the plaint, is sufficient for the purpose of enabling the Court to bind by its decree any one but the original party. That is a matter to be considered at the hearing of the suit. The suit is, I think, rightly on the list of suits for liquidated claims. It was originally on the general list of causes and not on the general list of suits for liquidated claims.

On the 7th of December last it was transferred without notice to the defendant to the general list of suits for liquidated claims. When a suit is transferred from the general list of causes, it is, I think, desirable that this should be done on notice [358] to the defendant. When this course has not been followed, the defendant is taken by surprise, and the result very often is that an application is made for an adjournment of the case.

Having regard to the fact that this case has come suddenly on the Peremptory List of Causes I am prepared to consider any application that may be made for an adjournment.

Mr. *Chaudhuri.*—I ask for a fortnight's adjournment.

The Court.—I allow you a fortnight. The case to go out of the Peremptory List for a fortnight, in order to enable you to take steps to be prepared with your defence.

Mr. *Sinha.*—If the defendant desires to be examined under a commission I ask that it should be done and completed within the fortnight.

The Court.—No; I will deal with any application for any further adjournment when it is made.

Costs of application to be costs in the cause.

Attorney for the plaintiffs: Babu *N. C. Bose.*

Attorneys for the defendant: Messrs. *Kally Nath Mitter & Sarbadhikary.*

27 C. 358=4 C.W.N. 490.

1899
DEC. 19.

APPEL-
LATE
CIVIL.

27 C. 358=
4 C.W.N.
490.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

PREONATH CHATTOPADHYA (*Plaintiff*) v. ASHUTOSH GHOSE AND OTHERS (*Defendants*).* [19th December, 1899.]

Specific Relief Act (I of 1877), s. 27—Specific performance of a contract. Suit for—Whether registration of an ekrarnamah *was sufficient notice of the contract.*

Mere registration of an *ekrarnamah* is not sufficient notice of a contract within the meaning of s. 27 of the Specific Relief Act.

[Diss., 6 Bom. L.R. 1043 (1050); N.F., 26 B. 538 (541); Appr., 7 C.W.N. 11; R., 16 C.L.J. 394=17 Ind. Cas. 927 (930); 24 M.L.J. 664=(1913) M.W.N. 525 (531) =14 M.L.T. 237=20 Ind. Cas. 385.]

THIS appeal arose out of an action brought by the plaintiff for specific performance of a contract alleged to have been made [359] with him by defendant No. 2 for the sale of certain tanks. The allegation of the plaintiff was that on the 7th Jaista 1289, B.S., the husband of defendant No. 2 executed a registered *ekrarnamah* undertaking for himself and for his heirs not to sell or transfer the said properties except to the plaintiff; that subsequently defendant No. 2, who had inherited her husband's share of the property, agreed to sell the same to the plaintiff for Rs. 100 and received Rs. 5 as earnest money, with the understanding that she would, after taking away the fishes in the tank, execute and get registered a *kobala* on receipt of the balance of the purchase money; that the plaintiff was ready to perform his part of the contract, but the defendant No. 2 on the 27th Asar 1303 B. S. executed a registered *kobala* of the same property in favor of defendant No. 1, whom the plaintiff informed of the prior contract with him; that, notwithstanding that, the defendant No. 2 purchased the said properties with full notice of the prior contract with the plaintiff, hence the suit was brought for specific performance of the contract. The defence of defendant No. 2 was that she was not aware of the *ekrarnamah* executed by her husband, that she did contract to sell her share in the tanks to the plaintiff, and she received Rs. 5 as earnest money, but as the plaintiff neglected to complete the sale by paying the balance of the purchase money, she sold the properties to defendant No. 1. The defence of defendant No. 1 mainly was that he was a *bona fide* purchaser for value, and without notice of the alleged contract, and therefore the plaintiff was not entitled to get the relief claimed by him. The Court of first instance, holding that "the registered *ekrar* was itself a notice to all purchasers of a right of pre-emption in the plaintiff," and upon the merits finding in favor of the plaintiff, decreed the suit.

On appeal, the Subordinate Judge reversed the decision of the first Court.

Against this decision the plaintiff appealed to the High Court.

Dr. *Ashutosh Mookerjee* and Babu *Mohini Mohun Chuckerbutty*, for the appellant.

Babu *Umakali Mookerjee*, for the respondents.

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* Appeal from Appellate Decree No. 479 of 1898, against the decree of Babu Mohim Chandra Ghose, Subordinate Judge of Hooghly, dated the 9th of December 1897, reversing the decree of Babu Srish Chunder Mukerjee, Munsif of Howrah, dated the 5th of April 1897.

1899 DEC. 19.

APPELLATE CIVIL.

27 C. 358 = 4 C.W.N. 490.

[360] The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff-appellant to enforce specific performance of a contract for sale of certain immoveable property against the defendant No. 2, the vendor, and the defendant No. 1 who is a purchaser from the defendant No. 2 of the property in dispute, on the allegation that the predecessor in interest of the defendant No. 2 had entered into an *ekrarnamah* or agreement with the plaintiff and another person to sell the property to them if it was sold at all; that subsequently there was a verbal contract between the defendant No. 2 and the plaintiff for the sale of the same to the latter for Rs. 100; and that the defendant No. 1, who had notice of the *ekrarnamah* and of the verbal contract, had, in spite of such notice, purchased the property from defendant No. 2.

The defence of defendant No. 1 was a denial of the alleged verbal contract, a denial of notice of the verbal contract or of the *ekrarnamah*, and a denial of the plaintiff's right. The defendant No. 2 also denied the plaintiff's right generally.

The first Court found for the plaintiff and gave him a decree. On appeal by the defendants the lower appellate Court has reversed that decree and dismissed the plaintiff's suit, holding that the alleged verbal contract was not proved; that the *ekrarnamah* could not be enforced as the suit was not based upon it, and as moreover the *ekrarnamah* was not between the plaintiff and the defendant No. 2, nor for exactly the same subject-matter as that now in dispute; that the defendant No. 1 had no notice of the *ekrarnamah* or of any verbal contract for sale; and that the registration of the *ekrarnamah* was not sufficient notice within the meaning of s. 27 of the Specific Relief Act.

In second appeal it is contended on behalf of the plaintiff-appellant that the lower appellate Court is wrong in holding that the registration of the *ekrarnamah* was not sufficient notice in law to the defendant No. 1, and that the suit was not based upon the *ekrarnamah*. It is further contended that the fact of the suit not being between the same parties as those who entered into the *ekrarnamah* makes no difference when the suit is brought [361] by one of the parties in whose favour the *ekrarnamah* was executed on the allegation that the other party who was jointly interested had waived the benefit of the *ekrarnamah*.

The first question for consideration in this appeal is whether the registration of the *ekrarnamah* was sufficient notice to the defendant No. 1 within the meaning of s. 27 of the Specific Relief Act. If this question is answered in the affirmative it will then be necessary to consider the other questions raised. But if it be answered in the negative, then, as admitted by the learned pleader for the appellant, it will be unnecessary to go into those questions. "Notice" is not defined in the Specific Relief Act. It has been found by the lower appellate Court as a fact that there was no actual notice to the defendant No. 1, either of the agreement or of the alleged verbal contract. The only notice that is relied upon is constructive notice by reason of the registration of the *ekrarnamah*. In s. 3 of the Transfer of Property Act "notice" is defined in these words: "A person is said to have notice of a fact when he actually knows that fact, or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the

circumstances mentioned in the Indian Contract Act, 1872, s. 229." This is as comprehensive a definition of "notice" as any that has ever been given. Notwithstanding this comprehensive definition of the term it has been held by this Court in the case of *Inderdawan Pershad* v. *Gobind Lall Chowdhry* (1) that registration does not amount to notice within the meaning of s. 81 of the Transfer of Property Act. If that is so, we see no reason why a different view should be taken as to the effect of registration on the question of notice in a case coming under s. 27 of the Specific Relief Act. Registration is not constructive notice under the English law, see the notes to *Le Neve* v. *Le Neve* (2). We may add, as was remarked by Mr. Justice Pontifex in the case of *Doorga Narain Sen* v. *Baney Madhub Mozoomdar* (3), that the doctrine of constructive [362] notice has been pushed to its extreme limit in England, and that in this country it requires even more careful application against a purchaser for value.

1899 DEC. 19. — APPELLATE CIVIL. — 27 C. 358 = 4 C.W.N. 490.

The learned vakil for the appellant relies upon the case of *Lakshmandas Sarup Chand* v. *Dasrat* (4). That case was considered by this Court in the case of *Inderdawan Pershad* v. *Gobind Lall Chowdry* (1), and was dissented from, and it has also been dissented from by the Madras High Court in the case of *Shan Maun Mull* v. *Madras Building Co.* (5). In this state of the authorities we think it right to follow the view taken of the effect of registration on the question of notice in this Court in the case of *Inderdawan Pershad* v. *Gobind Lall Chowdhry* (1), and we must hold that the registration of the *ekrarnamah* was not constructive notice to the defendant No. 1 within the meaning of s. 27 of the Specific Relief Act. That being so, it becomes unnecessary to consider the other questions raised in the appeal; and the appeal must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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27 C. 362 = 4 C.W.N. 41.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

ABDUL HOSSEIN AND OTHERS (*Plaintiffs*) v. KASI SAHU, MINOR, BY HIS MOTHER DEBI SAHUNI (*Defendant*).* [20th November, 1899.]

Appeal—Order permitting withdrawal of a suit—Appeal from order setting aside the order of withdrawal and dismissing the suit—Civil Procedure Code (Act XIV of 1882), *ss.* 2, 373, *and* 588.

An order under s. 373 of the Civil Procedure Code giving permission to withdraw a suit with liberty to bring a fresh one is not a "decree" within the meaning of s. 2 of the Code, and is not appealable.

If, however, such an order is appealed from, and the lower appellate Court sets aside the order and dismisses the suit, then the order of the lower appellate Court is a "decree" within the meaning of s. 2 of the Code, and is appealable.

Jogodendro Nath v. *Sarut Sunduri Debi* (6), followed.

[R., 16 C.L.J. 77 = 17 C.W.N. 116 (120) = 16 Ind. Cas. 940 (942).

[363] IN this suit the Court of first instance acceded to the plaintiffs' prayer to be allowed to withdraw the suit with liberty to bring a fresh

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* Appeal from Appellate Decree No. 2030 of 1897, against the decree of D. Cameron, Esq., District Judge of Purneah, dated the 10th of August 1897, reversing the decree of Babu Mohendro Nath Das, Munsif of Purneah, dated the 8th of April 1897.

(1) 23 C. 790. (2) W. & T.L.C. 7th Ed., Vol. II, 193. (3) 7 C. 199.
(4) 6 B. 168. (5) 15 M. 268. (6) 18 C. 322.

1899 Nov. 20. — APPELLATE CIVIL. — 27 C. 362 = 4 C.W.N. 41.

suit under s. 373 of the Civil Procedure Code. The District Judge on appeal set aside the order of withdrawal and dismissed the plaintiffs' suit. The plaintiffs thereupon appealed to the High Court.

Babu *Nalini Ranjan Chatterjee*, for the appellants.—The order of the first Court under s. 373 is not appealable, as such an order, it has been held in *Jogodindro Nath* v. *Sarut Sunduri Debi* (1), is not a "decree" within the meaning of s. 2 of the Code.

No one appeared for the respondents.

The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows :—

JUDGMENT.

This is an appeal against the decree of the District Judge of Purneah, dated the 10th August 1897. The suit was originally brought in the Munsif's Court, and the Munsif acceded to the plaintiffs' prayer to be allowed to withdraw the suit with liberty to bring a fresh suit under s. 373 of the Code of Civil Procedure. The defendant then appealed to the District Judge, and he set aside the order of the Munsif under s. 373, and dismissed the plaintiffs' suit.

The plaintiffs now appeal and contend that the District Judge's order is wrong, as no appeal lay to him from the Munsif's order under s. 373.

It is clear that an appeal does lie to this Court from the order of the District Judge, because the order was one dismissing the plaintiffs' suit, and this order is a decree within the definition given in s. 2 of the Code.

It further appears to us that the order of the District Judge is wrong, inasmuch as no appeal lay to him from an order under s. 373, the matter being concluded by a decision of this Court—*Jogodindro Nath* v. *Sarut Sunduri Debi* (1), in which **[364]** judgment the cases of the Allahabad Court on this point, which are of a conflicting nature, are considered and disposed of.

Under these circumstances we must be guided by the decision of this Court referred to above. We, therefore, set aside the order of the District Judge and restore that of the Munsif.

The appellant is entitled to his costs.

M. R. M.

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27 C. 364.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

HARO MOHUN ROY CHURAMONI AND OTHERS (*Defendants*) v. PRAN NATH MITTER (*Plaintiff*).* [24th November, 1899.]

Bengal Tenancy Act (VIII of 1885), ch. X—Conditions or incident of tenancy—Dispute as to right of way between two neighbouring tenants—Jurisdiction of Settlement Officer.

A Settlement Officer has no jurisdiction to decide civil disputes between tenant and tenant. A dispute as to a right of way between two neighbouring tenants

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* Appeal from Appellate Decree No. 49 of 1898, against the decree of W.B. Brown, Esq., Special Judge of Cuttack, dated the 25th of September 1897, affirming the decree of Babu Jotendra Mohun Sinha, Assistant Settlement Officer of Puri, dated the 28th of April 1897.

(1) 18 C. 322.

is of a civil nature, and the existence of a right of way cannot be regarded as a condition or incident of a tenancy.

Pandit Sardar v. *Meajan Mirdha* (1), referred to and followed.

[F., 8 C.W.N. 741 (743).]

THIS was a dispute between two neighbouring tenants as to the existence of a right of way. The Assistant Settlement Officer of Puri, acting under s. 105 of the Bengal Tenancy Act (VIII of 1885), found that the plaintiff had a right of way over the defendant's land, and directed an entry to be made in the record-of-rights that the plaintiff had a right of way. The Officiating Special Judge of Cuttack affirmed the order. The defendant thereupon appealed to the High Court.

Babu *Karuna Sindhu Mookerjee*, for the appellant.—The Settlement Officer was not justified in recording the existence of the alleged right of way; as it is not one of the conditions or incidents of a tenancy he had jurisdiction to record under s. 102, cl. (*h*). Further it has been laid down in *Pandit Sardar* **[365]** v. *Meajan Mirdha* (1) that the Settlement Officer has no jurisdiction to decide a dispute between tenant and tenant.

Babu *Manmatha Nath Mitter*.—A right of way is a condition of tenancy, and under chap. X the Settlement Officer has jurisdiction to decide such a dispute.

Babu *Karuna Sindhu Mukerjee* was not called upon to reply.

The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows :—

JUDGMENT.

This is an appeal against an order of the Special Judge of Cuttack, affirming an order by the Assistant Settlement Officer of Puri, passed in a settlement case under chap. X, Act VIII of 1885.

All the proceedings in the case, as well as the Judge's order now under appeal, are of date prior to the passing of Act III of 1898, B. C. So this appeal has admittedly to be disposed of under the provisions of the former chap. X.

The dispute is as to the existence of a right of way, and the parties are two neighbouring tenants. The Assistant Settlement Officer held the right of way over the defendant's land to exist, and the Special Judge has affirmed his order.

In appeal it is urged (1) that the Settlement Officer was not justified in recording the existence of the alleged right of way, as it is not one of the conditions or incidents of a tenancy he had jurisdiction to record under s. 102, cl. (*h*) : (2) that under the ruling of this Court in *Pandit Sirdar* v. *Meajan Mirdha* (1), the Settlement Officer had no right to decide a dispute between tenant and tenant.

We think these contentions must prevail. We consider that the existence of a right of way cannot be regarded, strictly speaking, as a condition or incident of a *tenancy*. A *raiyat* may have a right of way over the land of another *raiyat*, but not *qua tenant*. *Secondly*, the case of *Pandit Sirdar* seems to us clearly to lay down the principle that under the old chap. X, now repealed, a Settlement Officer has not jurisdiction to decide civil **[366]** disputes arising between tenant and tenant. The dispute in this case is undeniably a dispute of a civil nature, and must under the old chap. X be left to the decision of the Civil Courts.

(1) 21 C. 378.

1899 NOV. 24. — APPELLATE CIVIL. — 27 C. 364.

We decree this appeal, set aside the orders of the lower Courts and direct that all entries regarding the existence of the right of way in question be expunged from the record of rights. This order will carry costs—two gold mohurs.

M. R. M.

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27 C. 366=4 C.W.N. 252.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

KALAI AND OTHERS (*Petitioners*) *v.* KALU CHOWKIDAR (*Opposite Party*).* [11th January, 1900.]

Arrest—Village chaukidar, whether a police officer—Person unlawfully arrested by a private person and made over to village-chaukidar—Rescue from custody of village-chaukidar—Lawful custody—Penal Code (*Act* XLV *of* 1860), *s.* 225—*Criminal Procedure Code* (*Act* V *of* 1898), *s.* 59—*Village Chaukidari Amendment Act*, 1870 (*Bengal Act* I *of* 1892), *s.* 13.

S, who was alleged to have committed theft, was unlawfully arrested by a private person and made over to the custody of the village-chaukidar. The theft was not committed in view of such private person. *S* was rescued from the custody of the village-chaukidar by the accused. The accused were convicted under s. 225 of the Penal Code and sentenced each to two months' rigorous imprisonment.

Held, that a village-chaukidar cannot be properly regarded as a police officer within the terms of s. 59 of the Code of Criminal Procedure, and that *S*, therefore, was not in lawful custody at the time of his rescue. Conviction and sentence set aside.

[R., 29 A. 377 (378)=27 A.W.N. 94=5 Cr. L. J. 277; 41 C. 17=14 Cr.L.J. 494=17 C.W.N. 978=20 Ind. Cas. 750.]

IN this case it appeared that one *S* was found picking tamarinds from a tree, which *T* alleged to be his. *S* was arrested by a private person within the terms of s. 59 of the Code of Criminal Procedure. He was, however, not lawfully arrested, because the alleged offence, that of theft, was not committed in the view of such private person. *S* was then made over to the [367] village-chaukidar to take to the thana. *S* was rescued from the custody of the chaukidar by the accused. The accused were convicted under s. 225 of the Penal Code and sentenced each to two months' rigorous imprisonment.

Babu *Jogendra Chunder Ghose*, for the petitioner.

The judgment of the High Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

The question raised in this case is whether the person, who is said to have been rescued by the petitioners, was, at the time of such rescue, lawfully detained within the terms of s. 225 of the Penal Code, so as to make such act by the petitioners punishable. It appears that he was arrested by a private person within the terms of s. 59 of the Code of Criminal Procedure, and that he was not lawfully arrested because the alleged offence—theft—was not committed in the view of such person. He was then made over for custody to the village-chaukidar. The question then arises whether, on the delivery of such person to the custody of the

* Criminal Revision No. 774 of 1899, made against the order passed by G. Gordon, Esq., Sessions Judge of Dacca, dated the 22nd of October 1899.

village-chaukidar, he can from that time be considered to be in lawful detention, so far as the village-chaukidar is concerned, so as to bring him within the terms of s. 225 of the Penal Code. The decision on this point depends upon the interpretation to be put upon the term police officer in s. 59 of the Code of Criminal Procedure. The only authority cited to us, which is at all in point, is the case of *Empress* v. *Kallu* (1). We are of opinion that a village-chaukidar cannot be properly regarded as a police officer within the terms of s. 59. The duties of such an officer are in Bengal defined in s. 13 of Act I (B. C.) of 1892, and cl. (4) of that section declares that amongst such duties " he shall assist private persons in making such arrests as they may lawfully make, and shall report such arrests without delay to the officer in charge of the said police station." Now, having regard to the terms of this Local Act, it seems to us that the Legislature contemplated that such a person was merely to assist in a private arrest, and report the fact of such private arrest to the police station, and that it was not contemplated that he should exercise the duties set out in s. 59, that is, receive a person arrested by a private person or re-arrest him and take him **[368]** to the nearest police station. On these grounds we think that the person, whose rescue forms the subject of the charge of which the petitioners have been convicted, was not in lawful detention at the time of such rescue. The rule is, therefore, made absolute, and the conviction and sentence is set aside.

D. S.

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27 C. 368=4 C.W.N. 421.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

QUEEN-EMPRESS *v.* SOMIR BOWRA *alias* SOMIR BABA.*
[30th November, 1899.]

Sessions Court—Accused person, unable to understand proceedings in Court, Commitment of—Report by Magistrate of such proceedings to High Court—Power of High Court to pass final orders on such report—Discretion of High Court to order Sessions trial to be held—Code of Criminal Procedure (Act V of 1898), ss. 341 and 471—Penal Code (Act XLV of 1860), s. 302.

An accused person, who had been for some time confined in a lunatic asylum, was tried and committed to the Sessions by a Deputy Magistrate on a charge of murder. The accused was deaf and dumb, and could not be made to understand the proceedings which had been taken.

On the proceedings being forwarded to the High Court under s. 341 of the Code of Criminal Procedure it was held, that the law does not contemplate that the Sessions trial should necessarily take place. That it is discretional with the High Court on a commitment made to order the Sessions trial to be held, and the High Court must consider whether any benefit would be likely to result especially to the accused by such trial.

The High Court in this case having come to the conclusion that no benefit would be likely to result to the accused by his being tried by the Court of Session, found that the accused was guilty of the alleged murder, but that he was by reason of unsoundness of mind not responsible for his action, and directed him to be kept in the District Jail to await the orders of Government.

[Rel., 12 Cr.L.J. 386 (387)=11 Ind. Cas. 250=U.B.R. (1910), 4th Qr. 57; R., 12 Cr.L. J. 613 (614)=12 Ind. Cas. 989 (990)=13 P.R. 1911 Cr.]

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* Criminal Reference No. 6 of 1899, made by Babu Shoshi Bhusan Mukerjee, Deputy Magistrate of Rungpur, dated 14th November 1899.

(1) 3 A. 60.

1899 Nov. 30. — CRIMINAL REFERENCE. — 27 C. 368 = 4 C.W.N. 421.

In this case the accused was charged under s. 302 of the Penal Code with having murdered one K., in December 1890. On the 14th January 1891, an order was passed that the accused should be sent to a lunatic asylum. He was kept there till May [369] 1899, when the District Magistrate was directed by Government to place the accused under trial for the offence charged. The District Magistrate made over the case for trial to a Deputy Magistrate, who tried the accused and committed him to the Sessions under s. 302 of the Penal Code. The accused was deaf and dumb, and could not be made to understand the proceedings which had been taken. After committing the accused the Deputy Magistrate forwarded the proceedings with a report of the circumstances of the case to the High Court under s. 341 of the Code of Criminal Procedure.

The judgment of the High Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

The occurrence, which forms the subject-matter of these proceedings, took place in 1891.

The accused, who is charged with having killed Koliman Bibi, has until recently been in a lunatic asylum. He is now reported to be able to stand his trial. He is deaf and dumb and cannot be made to understand the proceedings, which have been taken. He has been committed to the Court of Session on a charge of murder, and the proceedings have under s. 341 of the Code of Criminal Procedure been sent for our orders. We have considered whether the commitment having been made the Sessions trial should be held. Section 341 declares that in such a case "if the enquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit." The law evidently does not contemplate that the Sessions trial shall necessarily take place. It leaves it to the High Court to determine this. The High Court can in a case triable by a Magistrate pass sentence on what is termed a conviction, though it cannot strictly speaking be so termed, seeing that the accused cannot in such a case make a proper defence. The proceedings are anomalous, and in all respects do not represent a complete trial. If they did, a special report for the orders of the High Court would be unnecessary. If, as we understand the law, it is discretional with the High Court on a commitment made to order the Sessions [370] trial to be held, we must consider whether any benefit will be likely to result especially to the accused by such a trial. We are unable to find any. The proceedings in the Sessions Court will in this case amount to merely a repetition of what has already been recorded before the Magistrate, and we shall then be called upon, as now, to pass final orders. In a case referred under s. 341, the Legislature seems to have contemplated that there should be a finding by the Magistrate either by what are called a conviction, or a commitment that *prima facie*, that is to say, on the evidence for the prosecution, an offence has been committed, and that the accused though not insane cannot be made to understand the proceedings, and there have been reported cases in which sentence has been passed by the High Court in the absence of any defence for such reason.

In the case before us there can be no reasonable doubt that the accused killed the woman Kaliman Bibi. So far as we can judge from the evidence he was lustfully inclined. When alarm was given he was

found sitting on her bed where she was lying dead from wounds on her body. We, however, find ourselves unable to hold that he was responsible for his action. In our opinion at the time of killing Kaliman Bibi he was, by reason of unsoundness of mind, incapable of knowing that he was doing what is wrong and contrary to law. We accordingly direct that he be kept in the Jail of this District until the order of the Local Government shall have been received, and the case will be reported for such orders.

1899 Nov. 30.

CRIMINAL REFERENCE.

27 C. 368 = 4 C.W.N. 421.

D. S.

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27 C. 370 = 4 C.W.N. 469.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

ZAMUNIA (*Complainant*) v. RAM TAHAL AND ANOTHER (*Accused*).*
[7th February, 1900.]

Witness—Cross-examination of witnesses—Cross-examination of prosecution witnesses before charge—Right of accused to have prosecuton witnesses recalled after charge drawn up for purposes of cross-examination—Discretion of Magistrate—Criminal Procedure Code (Act V of 1898), *ss.* 254, 256 *and* 257—*Penal Code (Act XLV of* 1860), *s.* 342.

After a charge has been drawn up the accused is entitled to have the witnesses for the prosecution recalled for the purposes of cross-examination; [371] s. 256 of the Code of Criminal Procedure gives the Magistrate no discretion in the matter.

After a charge has been drawn up it is the duty of the Magistrate to require the accused to state whether he wishes to cross examine, and if so which of the witnesses for the prosecution whose evidence has been taken.

The fact that there has been already some cross-examination before the charge has been drawn up does not affect this privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse such an application, on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

[R., 11 P.R. 1914 (Cr.); D., 14 C.P.L.R. 137 (138).]

IN this case the accused were convicted under s. 342 of the Penal Code by a Joint Magistrate and sentenced to pay fines of Rs. 50 each, in default one month's rigorous imprisonment each. The charge was drawn up on the 30th November 1899, and on the same date the accused applied to the Court to recall and cross-examine the witnesses for the prosecution; the Court, however, refused to allow this, on the ground that the prosecution witnesses had already been cross-examined at a reasonable length considering the importance of the case, and it was needless, in the opinion of the Court, to recall them. The case was referred to the High Court by the Sessions Judge of Tirhoot under s. 438 of the Code of Criminal Procedure.

The judgment of the High Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

Before the case for the prosecution had closed and the accused had been called upon to enter on his defence the accused applied to the Magistrate to re-summon the witnesses for the prosecution to cross-examine them. The Magistrate refused the application in these terms: "The

* Criminal Reference No. 13 of 1900, made by A. E. Staley, Esq., Sessions Judge of Tirhoot, dated the 17th of January 1900.

1900 FEB. 7. — CRIMINAL REFERENCE. — 27 C. 370= 4 C.W.N. 469.

prosecution witnesses have already been cross-examined at a reasonable length considering the importance of the case, and it is needless in my opinion to recall them. Refused."

Section 256 of the Code of Criminal Procedure gives the Magistrate no discretion in such a matter. The accused is entitled to have the witnesses recalled for purposes of cross-examination. Indeed, after a charge has been drawn up, it is the duty of the Magistrate to require the accused to state whether he wishes to cross-examine, and, if so, which of the witnesses for the prosecution whose [372] evidence has been taken. The fact that there has been already some cross-examination, before the charge has been drawn up, does not affect this privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse such an application, on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice (s. 257). An amendment of the previous law has been made by s. 254 for the purpose of protecting witnesses from the inconvenience of being required to attend a second time by enabling a Magistrate at any stage of the case to frame a charge in writing, and, if a cross-examination then takes place, it would be in the terms of s. 256, and then, unless there has been some amendment of the charge, a second cross-examination might be refused. But that is not the case before us.

The conviction and sentence must be set aside, and the fine, if paid, refunded. The trial must be re-opened and the witnesses, whom the accused desires to cross-examine, must be re-summoned. It is unnecessary that in revision we should consider the merits of this case.

D. S.

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27 C. 372=4 C.W.N. 497.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

QUEEN-EMPRESS *v.* ISAHAK AND ANOTHER, *Accused.**
[20th February, 1900.]

Appeal, Criminal—Taking of additional evidence by appellate Court—Dismissal of Appeal—Accused's right of appeal from such dismissal—Code of Criminal Procedure (Act V of 1898), *s.* 428.

Where an appellate Court has under s. 428 of the Code of Criminal Procedure taken additional evidence, the accused, whose appeal has been dismissed by such Court, has no right of appeal to the High Court.

IN this case the accused were convicted on the 9th of June 1899 by the Deputy Magistrate of Dacca under s. 147 of the Penal Code, and sentenced to two years rigorous imprisonment each. The accused appealed, and on the 26th of August [373] 1899 the case was remanded by the Sessions Court, and the Deputy Magistrate was directed to take further evidence for the defence. After the taking of such evidence the appeal was heard and dismissed by the Sessions Court. The accused applied to the High Court under its powers of revision, and contended, *inter alia*, that, inasmuch as the appellate Court had under s. 428 of the Code of Criminal Procedure taken additional evidence, the accused whose appeal had been dismissed had the right of appeal to the High Court.

* Criminal Revision No. 150 of 1900, made against the order passed by S. J. Douglas, Esq., Sessions Judge of Dacca, dated the 17th of January 1900.

Babu *Tarak Nath Chakravarti*, for the accused. 1900 FEB. 20.

The judgment of the High Court (PRINSEP and STANLEY, JJ.) was as follows ;—

CRIMINAL REVISION.

27 C. 372= 4 C.W.N. 497.

JUDGMENT.

It is necessary to consider only one matter raised in this application for revision.

The learned pleader contends that, inasmuch as the appellate Court has under s. 428 of the Code of Criminal Procedure taken additional evidence, the prisoner whose appeal has be n dismissed has the right of appeal to this Court. He relies on the case of *Queen* v. *Mohesh Chander Chattopadhia* (1), contending that s. 428 of the Code of Criminal Procedure, 1898, is in the same terms as that of s. 422 of the Code of 1861, under which that case was decided, and that consequently this Court is bound to follow that case. We observe that in addition to the case cited there is a judgment of a Full Bench.—*In the matter of Ram Narain Singh* (2)—heard on 14th October 1863 in which Peacock, C. J., Seton Karr, Louis Jackson and Elphinstone Jackson, JJ. (Kemp, J., dissenting) expressed the same opinion on the effect of s. 422 of the Code of 1861.

Section 422 of the Code of 1861 was in the following terms :

"In any case in which an appeal has been allowed it shall be competent to the appellate Court, if it think further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary, to direct such enquiry to be made and additional evidence to be taken. The result of the further enquiry and the additional evidence shall be certified to **[374]** the appellate Court, and the appellate Court shall, thereupon, proceed to pass such judgment, sentence or order as to such Court shall seem right."

By the amending Act VIII of 1869 this was repealed and re-enacted thus :—

"In any case in which an appeal has been allowed, the appellate Court, if it thinks further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the appellant to be necessary, may direct such enquiry to be made and additional evidence to be taken. The result of the further enquiry and the additional evidence shall be certified to the appellate Court, and the appellate Court shall thereupon proceed to dispose of the appeal in the manner prescribed by s. 419. Unless the appellate Court otherwise direct, the presence of the appellant may be dispensed with when further enquiry is made or evidence taken. The provisions of chap. XII relating to summoning and enforcing the attendance of witnesses and their examination shall, so far as may be, apply to witnesses examined under this section."

We must, therefore, take it that the Legislature by this amendment intended to, and did overrule the judgments of this Court in the unreported Full Bench case as well as in the case of *Queen* v. *Mohesh Chunder Chattopadhia* (1).

Section 282 of the Code of 1872, which reproduced this portion of the law, after re-enacting the first sentence of s. 422 of the Code of 1861 as amended by the Act of 1869, proceeds thus :—

"If the appellate Court takes further evidence and passes judgment and sentence, no fresh right of appeal arises in respect of such sentence." This is a further proof of the intention of the Legislature to supersede the cases mentioned.

(1) 2 W. R. Cr. 13. (2) (1863) Unreported.

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27 C. 372 = 4 C.W.N. 497.

Section 428 of the Code of 1882, which is the corresponding section of that Code, was in these terms :—

"In dealing with any appeal under this chapter, the appellate Court, if it thinks additional evidence to be necessary, may either take such evidence itself, or direct it to be taken by a Magistrate, [375] or, when the appellate Court is a High Court, by a Court of Session or a Magistrate. When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate Court, and such Court shall thereupon proceed to dispose of the appeal."

Section 428 of the Code of 1898, which is the present law, reproduces s. 428 of the Code of 1882, except that it requires the appellate Court to record its reasons for taking additional evidence.

The learned pleader for the petitioner contends that, inasmuch as the Codes of 1882 and 1898 do not contain the terms of s. 282 of the Code of 1872, which declare that "no fresh right of appeal arises in respect of such sentence" of an appellate Court, the right of appeal which was found to exist in the cases of this Court decided under the Code of 1861 is restored.

We cannot accept this view of the present law.

The appellate Court is under the present law as well as under the Code of 1882 directed "to dispose of the appeal." It is not competent, as in the previous Code, to pass judgment and sentence, if it takes further evidence. When it passed judgment and sentence under the Code of 1872, as well as under the previous Code of 1861, the appellate Court could enhance the sentence. The sentence in all such cases (whether there was an enhancement or not) becomes the sentence of the appellate Court, and it was on this ground that this Court held in the cases cited that there was a right of appeal against such sentence as it was a new sentence.

It is otherwise under the present Code. "The appellate Court shall thereupon dispose of the appeal." The appellate Court is not competent to pass a fresh sentence. Power to enhance is expressly prohibited. The appellate Court cannot consider and determine a new case disclosed by the additional evidence except in so far as to confirm or modify or set aside the sentence under appeal or to act as otherwise provided by s. 423 *(b)*.

The law is, therefore, expressed in terms altogether different from those set out in s. 422 of the Code of 1861, on which the cases in this Court proceeded. The function of the appellate [376] Court is to dispose of the appeal, and s. 430 declares that save in certain cases (which do not apply to the matter under consideration) "judgments and orders passed by an appellate Court upon appeal shall be final."

There is, therefore, no right of appeal in the matter before us. The application for revision is discharged.

D. S.

27 C. 376.

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APPEL-
LATE
CIVIL.

27 C. 376.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

BRAHMOMOYI DASI (*Plaintiff*) *v.* ANDI SI (*Defendant*).*
[27th November, 1899.]

Limitation—Plaint instituted within time—Plaint insufficiently stamped—Order to supply the deficiency not complied with within the time allowed—Registration of plaint—Civil Procedure Code (Act XIV of 1882), s. 54—Limitation Act (XV of 1877), s. 4.

A plaint was filed one day before the expiry of the period of limitation, but the Court-fees were deficient and the plaintiff was ordered to pay the deficient Court-fees within a week. This order was complied with one day after the expiry of the time allowed and the plaint was registered.

Held, that the suit was barred by limitation, as the deficient Court-fees were not supplied within the appointed time, and that the fact of the plaint being registered does not prevent its rejection under s. 54 of the Civil Procedure Code, the terms of which are imperative and mandatory.

Moti Sahu v. *Chatri Das* (1) and *Huri Mohun Chuckerbutti* v. *Naimuddin Mahomed* (2), distinguished. *Hubibul Hossein* v. *Mahomed Reza* (3), dissented from. *Kishore Singh* v. *Sabdal Singh* (4), and *Karman Singh* v. *Cockell* (5), approved.

[**Appr.**, 34 C. 20 (F.B.)=4 C.L.J. 421=11 C.W.N. 38=1 M.L.T. 355; **R.**, 2 C.L.J. 70=9 C.W.N. 844; 12 C.L.J. 62=14 C.W.N. 882 (884)=6 Ind. Cas. 424; 13 C.L.J. 78 (83)=7 Ind. Cas. 578; **D.**, 2 Ind Cas. 1.]

IN this suit the plaint was filed on the 11th March 1896, one day before the expiry of the period of limitation. The Court-fees [377] were deficient, and the Munsif on the 13th March ordered the balance to be paid within a week. The balance, however, was not paid till the 21st March, and the suit was registered. Objection was taken on the ground of limitation, and the Subordinate Jude held that the suit could not be regarded as instituted within the period of limitation, as the balance of the Court-fees was paid after the period allowed by the Court.

From this decision the plaintiff appealed to the High Court.

Babu *Debendranath Ghose*, for appellant.—The plaint being filed within the period of limitation, the suit is not barred by limitation, although the balance of the Court-fees was not paid within the period—see *Moti Sahu* v. *Chattri Das* (1), and *Huri Mohun Chuckerbuti* v. *Naimuddin Mahomed* (2). Further, the plaint having been once registered, it cannot be rejected—see *Hubibul Hosein* v. *Mahomed Reza* (3).

Babu *Jadub Chander Seal*, for respondent.—In the cases cited by the learned pleader the balance was paid within the time allowed by the Court, whilst in the present case they were paid after the time, and under s. 54 of the Civil Procedure Code, the Court is bound to reject the plaint, and this rejection may take place at any stage—see *Kishore Singh* v. *Sabdal Singh* (4), and *Karman Singh* v. *Cockell* (5).

The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows :—

JUDGMENT.

This suit has been dismissed by the lower appellate Court as barred by limitation.

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* Appeal from Appellate Decree No. 204 of 1898, against the decree of Babu Prosanna Kumar Ghose, Subordinate Judge of Midnapur, dated the 2nd of November 1897, reversing the decree of Babu Kali Dhan Mukerjee, Munsif of Contai, dated the 22nd of September 1896.

(1) 19 C. 780. (2) 20 C. 41. (3) 8 C. 192. (4) 12 A. 553. (5) 1 C.W.N. 670.

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The question for determination is whether it was right in doing so. The facts are that the suit was instituted on the 11th March 1896, one day before the expiry of the period of limitation. The Court-fees were deficient, and the Munsif on the 13th March ordered the deficient Court-fees to be paid in within a week. **[378]** They were not paid in till the 21st March, that is, until at least one day after the expiry of the time allowed by the Court. Objection to the suit on the ground of limitation was taken in the Court of first instance, but was overruled. The objection was renewed in the lower appellate Court and prevailed. The Subordinate Judge was of opinion that the suit could notbe regarded as instituted within the period of limitation, as the 21st March, when the deficient Court-fees were actually paid in, was after the period allowed by the Court for their payment.

The plaintiff appeals and contends that the lower appellate Court is wrong. The cases reported in *Moti Sahu* v. *Chhatri Das* (1) and *Huri Mohun Chackerbutti* v. *Naimuddin Mahomed* (2) are relied on; but we are of opinion that they are not in point, as they are cases in which the deficient Court-fees were paid in within the time allowed by the Court. This is not the case in the present suit. We, therefore, consider that the lower appellate Court's decision on the question of limitation is correct and must be affirmed.

The pleader for the appellant, however, argues that the suit having been registered, the plaint could not be rejected, and the suit dismissed by the Subordinate Judge. He cites the case of *Hubibul Hossein* v. *Mahomed Reza* (3) in support of this plea. But we do not agree with the view expressed by the Judges who decided this case. The terms of s. 54 are imperative and mandatory, the wording being "the plaint *shall* be rejected." Then the matter has been considered and a different conclusion come to in cases decided both in the Allahabad High Court and this Court—See *Kishore Singh* v. *Sabdal Singh* (4) and *Karman Singh* v. *Cockell* (5). Moreover, the decision in the case of *Hubibul Hossein* v. *Mahomed Reza* (3) seems opposed to the rule apparently laid down by s. 4, Act XV of 1877, ills. (*a*) and (*b*).

[379] We do not consider ourselves bound by this decision, or that it is necessary to refer the conflicting decisions in *Hubibul Hossein* v. *Mahomed Reza* (3), and *Karman Singh* v. *Cockell* (5) to a Full Bench, as the rule enunciated in the former case appears to us to be an *obiter dictum*, the case having been disposed of on an altogether different point.

For these reasons, we dismiss this appeal with costs.

M. R. M.

(1) 19 C. 780. (2) 20 C. 41. (3) 8 C. 192.
(4) 12 A. 583. (5) 1 C.W.N. 670.

27 C. 379.

1899
SEP. 6.

APPELLATE CIVIL.

27 C. 379.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Wilkins.

HARNABH PERSHAD *alias* RAJAJEE (*Plaintiff*) *v.* MANDIL DASS (*Defendant*).* [6th September, 1899.]

Hindu Law—Customary Law—Jains—*Power of sonless widow to adopt a son without permission of husband*—Saraogis—*Right of a sonless Jain widow—Limitation Act (IX of* 1871*), art.* 129—*Minority.*

Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different; and oral evidence of the same kind is equally admissible. There is nothing to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside.

Upon the evidence in the case, consisting partly of judicial decisions and partly of oral testimony, it was *held* that the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of his kinsmen, was sufficiently established, and that in this respect there was no material difference in the custom of the Agarwalla, Choreewal, Khandwal and Oswal sects of the Jains; and that there was nothing to differentiate the Jains at Arrah from the Jains elsewhere.

Held, also, that the terms *Jain* and *Saraogi* are synonymous.

A childless Jain widow acquires an absolute right in her husband's separate property.

An adoption was made by *M*, a Hindu widow, to her husband *J* in 1854, when the plaintiff's father, the then nearest reversionary heir to *J*, was alive; and the adopted son B got actual possession of the property left by *J.*, on the 14th April 1877, under a deed of gift executed by *M*. *M* died on the 6th [380] February 1883; and *B* was succeeded by his son, the present defendant. The plaintiff's father died on the 15th October 1875, and the plaintiff attained his majority on the 28th July 1894, having been born on the 29th July 1873. The plaintiff brought the present suit against the defendant, on the 28th January 1895, for the recovery of the properties left by J as being his nearest reversionary heir.

Held, that the suit was barred under art. 129 of the Limitation Act IX of 1871, as it involved the setting aside of an adoption made in 1854, having been brought after 12 years from the date of the adoption, and the period of limitation having commenced to run during the lifetime of the plaintiff's father.

[R., 15 C.L.J. 97 (101) = 15 C.W.N. 524 = 7 Ind. Cas. 427.]

THE plaintiff Harnabh Pershad brought the present suit on the 28th January 1895, against the defendant Mandil Dass, for recovery of possession of the disputed properties, with mesne profits, on the ground that he was the nearest reversionary heir of one Jinwar Dass, to whom the properties belonged, and who died without issue in 1850, leaving a widow, Misri Koer. It appears that Jinwar Dass was the son of one Birjpal Dass, who was a grandson of one Moti Lall; and that the plaintiff Harnabh Pershad is the son of one Jugmundil Dass, who was a great grandson of the said Moti Lall.

The plaintiff alleged that Jinwar Dass, his widow, and the plaintiff himself were all Agarwalla Hindus, governed by the Mitakshara law; that there was a banking business at Arrah belonging to the father of Jinwar Dass, from the income of which considerable properties were acquired, and that Jinwar Dass got these ancestral properties by inheritance, and acquired other properties himself; that, on the death of Jinwar Dass, his widow, the said Misri Koer, obtained by arrangement one-half of the

* Appeal from Original Decree No. 286 of 1897, against the decree of Babu Harikrishna Chatterjee, Subordinate Judge of Shahabad, dated the 14th of June 1897.

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said properties, which share formed the subject matter of the present suit. It was further alleged that Misri Koer had only a life interest in the properties inherited from her husband, as well as in the properties acquired by her from the income of the former properties, such as every childless Hindu widow governed by the Mitakshara law has in the estate left by her husband; that after the death of Misri Koer, Bhagwan Dass, the father of the defendant, and after the death of Bhagwan Dass, the defendant himself, took forcible possession of the disputed properties, during the minority of the plaintiff, although they had no legal right to the same; that Jugmundil Dass, the father of the plaintiff, [381] died on the 15th October 1875, that he, the plaintiff, was born on the 29th July 1873, and attained majority on the 28th July 1894; and that on the date of the death of Misri Koer, which was alleged to have taken place on the 19th February 1883, the disputed properties devolved on the plaintiff alone as heir to Jinwar Dass, and that the cause of action accrued on that date.

The defendant alleged, amongst other things, that Misri Koer died on the 6th January 1883, that the plaintiff was born in the year 1870, and that, therefore, the suit was barred by the special and general law of limitation. It was further contended that Jinwar Dass and all his relations belonged to the Saraogi Agarwalla sect of the Jains, and were governed by the customs and usages prevailing among that sect, and subject to them, by the Mitakshara Law, and that adoption in the family and in the Saraogi Agarwalla community of Arrah and elsewhere was governed by such customs and usages, and not by the Mitakshara law; that according to such customs, and under verbal direction given by her deceased husband, Misri Koer in 1854 adopted Bhagwan Dass, the father of the defendant as a son to her deceased husband and to herself in the presence of the caste people, including the plaintiff's father, and since then Bhagwan Dass had all along been recognized and treated as their son by their relations and caste people including the plaintiff's father and the plaintiff; and that after Bhagwan Dass's death the defendant has been similarly recognized and treated, his father and himself being in possession of the properties of Jinwar Dass and Misri Koer as their son and grandson in their own right and not as trespassers. It was also alleged that on the 14th April 1877, Misri Koer executed a deed of gift in favour of the adopted son, Bhagwan Dass, whereby she divested herself of her life interest and absolutely transferred to him all the immoveable properties whether left by her husband or acquired by her; and that as by the customs and usages obtaining among the Saraogi Agarwalla sect of Jains, Misri Koer became absolute owner of the estate left by Jinwar Dass, the defendant's father became absolutely entitled to the properties under the said deed of gift and also by adoption. It was further urged that the suit was barred by limitation, the validity of the adoption not having been called into question within the time prescribed by law.

[382] The Subordinate Judge found that the date of the birth of the plaintiff, and that of the death of Misri Koer, were as the plaintiff stated them, but, deciding all the other issues against the plaintiff, he dismissed the suit.

The plaintiff appealed to the High Court.

The Advocate-General (Mr. *Woodroffe*), Moulvie *Mahomed Yusoof*, Babus *Saroda Charan Mitter*, *Mohabir Shahay* and Moulvie *Mahomed Habibullah*, for the appellant.

Dr. *Rash Behary Ghose*, Babus *Saligram Singh*, *Makhan Lal*, and *Seo Sarun Lal*, for the respondent. 1899 SEP. 6.

The judgment of the High Court (MACPHERSON and WILKINS, JJ.) was as follows:— APPELLATE CIVIL.

JUDGMENT.

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The parties to this suit are Jains of the Agarwalla class and residents of Arrah in the district of Shahabad. The suit relates to properties of considerable value, which are said to appertain to the estate of Jinwar Dass, who died in 1850 without issue, but leaving a widow Misri Koer. The plaintiff's case is that Misri Koer died on the 19th February 1883 ; and that he then under Mitakshara law as heir of Jinwar Dass became entitled to all the properties claimed. The suit was instituted on the 28th January 1895, and the plaintiff says that he attained majority (21 years) on the 28th July 1894.

The defendant says that the plaintiff is not the heir of Jinwar Dass, and that the suit is also out of time as Misri Koer died on the 6th January 1883, and the plaintiff attained majority more than three years before the date of suit. On the merits his case is that according to the custom prevalent among the Agarwalla Jains, a sonless widow acquires an absolute right to the property left by her husband, and can also adopt a son to him without his permission ; that in 1854 Misri Koer personally adopted his father Bhagwan Dass reserving to herself the life interest and that in 1877 she executed a deed by which she gave to Bhagwan all the property which she had inherited from her husband or had herself acquired, and that since then, Bhagwan and after his death in 1893 he, the defendant, has been in undisputed possession of the same. He further says that as a matter of fact, Jinwar Das did give verbal permission to [383] Misri Koer to adopt a son, that there was a good and valid adoption whether the Mitakshara law does or does not apply, and that the plaintiff is estopped from denying the adoption as he, his father Jug Mandil, and all the kinsmen throughout recognised and treated Bhagwan as the adopted son of Jinwar Dass. He also contends that it is not open to the plaintiff now to question either the fact or the validity of the adoption made in 1854, as no suit was brought to set it aside when the Limitation Act IX of 1871 was in force. The existence of the alleged custom and the facts of the alleged adoption, the permission to adopt, the treatment and recognition, were all denied by the plaintiff who said that, if there was any adoption at all, it was an adoption by Misri Koer to herself and not to her husband and that the defendant could derive no benefit from it.

On the issues raised to meet all the above mentioned contentions the Subordinate Judge in a full and careful judgment found that the plaintiff is the nearest heir of Jinwar Dass, and that the suit is in time, Misri Koer having died on the 19th February 1883, and the plaintiff having attained majority on the 28th July 1894. Deciding, however, all the other issues against the plaintiff, he dismissed the suit. The plaintiff appeals, and the appeal really opens the whole case, for the defendant supports the judgment of dismissal by contending that the suit ought also to have been dismissed on the preliminary grounds, that the plaintiff was not the heir of Jinwar, and that the suit was out of time under the provisions of the Limitation Act now in force. For the plaintiff it is contended—

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(1) That the alleged customs are not proved and that the Mitakshara law must apply.

(2) That Misri Koer did not, in fact, adopt Bhagwan Dass, and that, even if she did so, the adoption was personal to herself and conferred no title on Bhagwan to the properties now claimed: That Jinwar gave no verbal permission to his wife to adopt.

(3) That Bhagwan was never treated or recognized as the adopted son of Jinwar, and that the supposed acts of treatment and recognition, even if they existed, did not create an estoppel.

[384] (4) That the suit is not barred under the Limitation Act IX of 1871, as it was not necessary under that Act to bring a suit to set aside the alleged adoption of Bhagwan.

It will be convenient to deal first with the questions raised by the defendant as they are of a preliminary character. We see no sufficient reason for dissenting from the Subordinate Judge's conclusion that the plaintiff is the nearest reversionary heir of Jinwar Dass. The evidence is certainly very meagre, but there are few male members of the family now alive. Comparing, however, the evidence of both sides we cannot say that the Subordinate Judge was not justified in considering the evidence for the plaintiff more reliable and sufficient. We feel, however, grave doubt whether he was right in finding that Misri Koer died on the 19th February 1883, and not on the earlier date stated by the defendant. The reason which the plaintiff gives for remembering the date may be more plausible than the reason given by the defendant, but still it is very vague and not of much value where the question is one of days. Much reliance is placed upon the entry in the death register, but having regard to the state in which the book is, and to the evidence of Jung Bahadoor Lall in connection with it, we think no weight can be attached to the entry. From his evidence it would appear that in 1883 the register was in charge of the police, and it is not shown that it was kept under the provisions of Bengal Act IV of 1873, or of part VIII of Bengal Act V of 1876, which was the Municipal Act then in force. Apart also from all objections which might be taken to the register itself, there is no guarantee for the correctness of the date of the death as entered in it. The entry shows that Mir Karim Buksh reported the death, but who he was we do not know, and it is quite possible that the death may have been reported some time after it actually occurred and entered without any particular regard to the date of occurrence. The Subordinate Judge seems also to have been under some misapprehension as to the nature of the entries in the defendant's books kept by Udoy Chand. There is no reason to doubt that the books were regularly kept in the course of business. Udoy deposes that he made the entries [385] and refreshing his memory from them he gives the date of Misri's death which he certainly could do, if the entries are correct. We do not understand the reason which the Subordinate Judge gives for not relying on them and no good reason for rejecting them has been suggested to us. We cannot, therefore, uphold this part of the decision. The matter is not, however, of much importance as we cannot interfere with the decision as to the date on which the plaintiff attained his majority, and if that is correctly found, the suit is within time, although instituted more than twelve years after Misri Koer's death. If Ramyad Pattak's evidence is believed, and the Subordinate Judge has believed it, there is no doubt about the date of the plaintiff's birth. The truth of his evidence is questioned on

the ground that he was not the regular priest of the family, and that he is said to have been called when the regular priest Buloo Misser was temporarily absent. This may give rise to some suspicion, but it would not justify us in rejecting his evidence in the absence of other evidence to show that it is false. It is said that the plaintiff did not produce the certificate under which a guardian was appointed by the Court, and that he must be taken to have attained majority at the age of 18 years, but the fact that a guardian was appointed by the Court was not questioned in the Court below and cannot be questioned now.

The most important point in the case is as to the existence of the customs relied on by the defendant, and the evidence bearing upon it is very voluminous as a great number of witnesses residing at Arrah and elsewhere have been examined, some of them at great length. This is not the first occasion on which the question of Jain customs has been raised and brought before the Courts in India, and before dealing with the evidence it will be as well to see how the cases stand.

In *Govind Nath Roy* v. *Gulab Chand* (1), it was held that a Jain widow could adopt a son without the sanction of her husband. This was a Moorshedabad case decided in 1833, and the decision was apparently based upon the *Vyavastha* of a Pundit. There was a further question which was not decided as to the right of the widow under the Jain law to alienate or give away property after **[386]** the adoption. The opinion of the Pundits as to this was conflicting. In *Sheo Singh Rai* v. *Dakho* (2), the Allahabad High Court held in 1874 that the sonless widow of a Saraogi Agarwalla takes by the custom of the sect an absolute interest in the self-acquired property of her husband, and that she could adopt without the permission of her husband or the consent of his heirs. There was a further question whether on the adoption the estate taken by the widow passed to the son as proprietor or whether she could retain the ownership. It was not, however, necessary to decide that point. The widow had apparently claimed to retain the ownership, at least she had treated the adopted son as her successor, but as she and the adopted son were both plaintiffs and not in contest on the point, the Court made a decree declaring her right to be maintained in possession as proprietor or in the alternative as manager on behalf of her infant son. This was a Meerut case. It was appealed to Her Majesty in Council and the decree was upheld (3). I shall have to allude to their Lordships' judgment later on, but may point out here that the decision was arrived at after a great deal of evidence had been taken at Delhi and other places as to the custom of the Jains. There appears to have been a conflict of evidence as to the extent of the widow's dominion over the ancestral property of her husband, when that property was divided or undivided, but as the suit only related to the self-acquired property of her husband, it was unnecessary to express any opinion as to the extent of her right over the ancestral property whether divided or undivided.

In *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi* (4), a Moorshedabad case, it was held that a widow of the Oswal Jain sect could, according to the custom of the sect, adopt a son without the authority of her husband. There the family had become Vaishnabs or orthodox Hindus, but it was held that this change did not affect the laws

(1) (1833) 5 Select Reports, S.D.A. Calc. 276.
(2) 6 N.W.P. 382.
(3) 1 A. 688=2 C.L.R. 193=5 I.A. 87.
(4) 17 C. 518.

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and customs by which the personal rights and status of the members of the family were governed.

[387] In *Lakhmi Chand* v. *Gattoo Bai* (1), an Aligarh case, the right of a Jain widow to adopt a son without the permission of her husband or the consent of his heirs was recognized, and it was held that the adoption must be taken to be to her husband. In this case the question was whether the widow could make a second adoption to her husband, the son whom she had first adopted having died an infant and unmarried. It does not appear that the right to make one adoption to her husband without permission was at all disputed, and it may be, for all that appears to the contrary, that the right to make the second adoption was disputed as inconsistent with the Jain customs. The case is not, therefore, of much value on the questions now raised, nor does it appear to what sect of Jains the parties belonged.

In *Bachebi* v. *Makhan Lal* (2), a Manipuri case, which came before the Allahabad Court on second appeal, the question was whether a Jain widow of the Bindala sect, said to be a small one confined to a few districts, could by the custom of the sect alienate ancestral property inherited from her husband, and it was held that the custom was not established and that the Hindu law must take effect.

In *Shimbhu Nath* v. *Gayan Chand* (3), a Saharanpur case on second appeal to the High Court, it was held that an Agarwalla Jain widow had full power of alienation over the non-ancestral property of her deceased husband, but that no such power was proved over the ancestral property. Edge, C. J., and Banerji, J., seemed to consider that the decision in *Sheo Singh Rai's* case was sufficient to prove the custom as regards the non-ancestral property in the absence of any evidence to the contrary.

In *Peria Ammani* v. *Krishna Sami* (4), a Tanjore case, a Jain widow set up the right to adopt a son without her husband's permission, but it was found that the custom was not proved. From the judgment of Best, J., it appears that the parties to the suit were natives of Southern India, whose ancestors had been [388] converted to Jainism, and it was distinguished on that ground from the case of *Ritchurn Lall* v. *Soojun Mull Lallah* (5). In *Mondat Koer* v. *Phool Chand Lal* (6), a case from Barh in the Patna district, which is much relied on for the appellant, the parties are described as Agarwalla Saraogis of Barh, and a sonless widow set up a right by Jain custom to take an absolute interest in her husband's property, and it was found that the custom was not proved. The case has been much relied on as an authority for the proposition that the particular custom set up must be proved to apply to the particular place where it is alleged to exist, and that evidence of a similar custom at other places is of little or no importance. We are informed that this case is now on appeal to Her Majesty in Council.

Some other cases have been cited in which a special custom of the Jains has been set up, but the custom has been either different to the customs alleged in the present case, or there has been no decision upon it. In *Chandun Koer* v. *Padmanath Koer* [Exs. 26, 8, III, BBBB.] (7), the parties resided as here in the Shahabad district. There were two brothers who were said to be joint in estate. The elder brother died leaving a widow who got possession of his share. The mother of the younger brother,

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(1) 8 A. 319. (2) 3 A. 55. (3) 16 A. 379.
(4) 16 M. 182. (5) 9 Mad. Jur. 21. (6) 2 C.W.N. 154.
(7) [In the Court of the Principal Sudder Amin of Shahabad and on appeal, in that of the District Judge of Shahabad; with the Vyavastha of the Calcutta Pundit, Baidya Nath Misra—REP.]

a minor, brought a suit to establish the minor's right to it. The widow of the elder brother opposed the claim on the ground that according to the Jain custom it had devolved on her. The case was eventually compromised, the elder widow, the defendant, getting a life interest in some immoveable properties and an absolute interest in some bonds and decrees for money. This was a case of the year 1863. Under the Mitakshara law, if the brothers were joint, the minor brother would have taken the whole estate. In the present case there is no question of a joint estate.

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In *Lalla Mohabeer Pershad* v. *Kundun Koowar* (1), which was also a Shahabad case, decided in 1867, a childless Jain widow **[389]** claimed her husband's share of the property as hers under the law regulating succession among the Jains, whether the family was divided or undivided. The claim was opposed on the ground that the family was undivided. Peacock, C. J., and L. S. Jackson, J., held that there was no sufficient evidence to show that the law of succession among Jains was different from that of the ordinary Hindu law governing the particular province in which the property was situated and which was the law of the Mitakshara. But they held that the property being separate the plaintiff was entitled to it under the Mitakshara Law as heiress of her husband. It does not appear that any evidence of custom was given, but a Vyavastha of a Pundit as to the Jain law or custom and which was in the plaintiff's favour put in. Peacock, C. J., considered that the Vyavastha was not based on any good authority. This case went on appeal to the Privy Council (2), but no question of Jain custom was gone into, and the decision of the High Court was affirmed on the supposition that the Mitakshara Law applied. The case has been much relied on as an authority for the proposition to which we have referred in connection with *Mandit Koer's* case, and it was cited in that case. Peacock, C. J., said that the custom set up must be proved, and that, if it is not proved, the law of the locality must prevail. He does not profess to deal with the question of law of how the custom is to be proved.

In *Chotay Lall* v. *Chunnoo Lall* (3), a Calcutta case, no question of Jain custom was decided, but their Lordships explained the judgment in *Sheo Singh Rai's* case, upon which it was attempted to put too wide a construction.

In *Bhagvan Das Tejmal* v. *Rajmal* (4), a Jain custom was set up by which a son could be made over to a person in adoption by his relatives when he and his widow were both dead. It was held not to be proved. The judgment contains an account of the Jains and their religious views.

In *Bimal Dass* v. *Sikhar Chand* (5), an unreported case, **[390]** from the Shahabad district decided in 1879 (Ex. 24), a widow inherited immoveable property from her husband and on her death her daughter became the heir. On the daughter's death her husband claimed the property as her heir under a custom peculiar to the Jains. It was held that the custom was not established, and that the succession must go according to the Mitakshara Law. Garth, C, J., said he was satisfied that the Mitakshara Law was observed in questions of inheritance amongst the Agarwalla sect of Jains at Arrah, but this must, of course, be taken as having reference to the evidence in the case and the particular custom pleaded.

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(1) 8 W.R. 116. (2) 1 I.A. 55.
(3) 4 C. 744 = 3 C.L.R. 465 = 6 I.A. 15. (4) 10 B.H.C.R. 241.
(5) [Appeal from Original Decree, No. 118 of 1877, decided by Garth, C.J., and Prinsep, J., on the 21st April 1879—REP.]

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The cases, therefore, show that for many years past the Jains in different parts of India have been setting up a special custom by which they are regulated in certain matters relating to succession and adoption, and that at least in three cases, two of the Moorshedabad and one of the Meerut district, the right of a Jain widow to adopt a son to her deceased husband without his permission has been established and recognized. The only case in which the right was set up and not established is the Madras case, and that may be distinguished for the reasons already stated. In two cases from Meerut and Shaharanpur it was found that she acquired an absolute right to the self-acquired property of her deceased husband, and in one case from the Patna district it was held by this Court, without drawing any distinction between ancestral and self-acquired property, that no such custom was established among the Jains of that locality.

It is broadly argued on the one hand that this case must be decided on the local evidence as to the prevalence of the alleged customs in the Shahabad district without reference to the prevalence of the customs among Jains in other parts of the country; on the other, that the Jains not being Hindus in religion, the Hindu Shastras, which are founded on that religion, cannot be held to apply to them at all; or at all events that, if the Jains are subject to Hindu law, except in so far as it is controlled by their own special custom, the existence of the custom, as regards adoption, must now be taken to be judicially established, and must be recognized without further proof as applicable to all Jains. Neither argument appears to us to be sound or consistent with the rule, as stated by their Lordships of the Judicial [391] Committee in *Sheo Singh Rai's* case, and explained in the case of *Chotay Lall.* In the latter case they say this: "The customs of the Jains, where they are relied upon, must be proved by evidence as other special customs and usages varying the general law should be proved, and that, in the absence of proof, the ordinary law must prevail. They add that the decision in *Sheo Singh Rai's* case "did no more than adopt and affirm the law, to be deduced from a long roll of cases in India, that when the customs of the Jains are set up, they must be proved like other customs varying the ordinary law, and that, when so proved, effect should be given to them." The mere fact that a man is a Jain is not, they say, enough to establish the conclusion that the ordinary law did not apply to him.

There is nothing in what their Lordships say to limit the scope of the enquiry to the particular locality in which the persons setting up the custom reside. The defendant is not setting up a local custom; his case is that the customs relied on prevail amongst all the Jains who are now a scattered community and that the Arrah Jains have adhered to them. It would be impossible to prove the existence of a custom prevalent amongst the Jains generally by evidence of a purely local character, but, if the general custom is proved, the question might arise whether the Jains of any particular locality had adhered to or departed from it, and that would depend upon the facts and circumstances of each case. We consider, therefore, that judicial decisions recognizing the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless, of course, it is shown that the customs are different. It follows that oral evidence of the same kind is equally admissible. If it were otherwise it would be extremely difficult to say where the line should be drawn, east or west of Arrah! Agra is not very much further on the one side than Calcutta is on the other. Moreover the adoption cases, to

which we have referred, were not decided on the evidence of local witnesses only. 1899 SEP. 6.

The plaintiff certainly tried to make the issue a narrow one. His case as stated in the plaint and explained by his pleader was that the Agarwallas of Arrah were not Saraogis at all, but what [392] he called Hindu Jains, who were governed entirely by the Mitakshara Law, and nearly all his witnesses say that the Arrah Agarwallas are not Saraogis. In that view of the case evidence of the customs governing the Saraogis would be immaterial. It is, however, abundantly proved, and the fact is not now disputed, that the terms *Jain* and *Saraogi* are synonymous, all Saraogis being Jains, and all Jains being Saraogis, except perhaps in so far as that term may be used to distinguish the laity from the priesthood. APPELLATE CIVIL. 27 C 379.

The defendant has, apart from the local witnesses, examined on the question of custom a great number of witnesses residents of the districts to the west of Arrah and extending up to Delhi and Kurnal, and also witnesses residing in Calcutta, Moorshedabad and Gaya to the east of Arrah. These include persons of the Agarwalla, Choreewal, Khandwal and Oswal sects of Jains. Many of them are persons of position and independence not likely to be induced to come forward and give false evidence. The defendant has also examined eight witnesses now non-residents of Arrah. Of these one resides at Agra, one at Paniput, three at Famchal, and three at Calcutta. We agree with the Subordinate Judge that the evidence greatly preponderates, both in quantity and value, as to the existence of the custom that a sonless Jain widow can adopt a son to her husband without his permission or the consent of his kinsmen. Taken in connection with the decisions to which we have referred we think it is sufficient to establish that custom.

The evidence of the witnesses examined for the defendant may be said to be unanimous on the point, and shows that there is in this respect no difference in the custom of the four classes of Jains mentioned above. There are no doubt some minor differences, as to whether the boy must be adopted from the same Gotra, as to the ceremonies observed, as to whether the members of the different classes can intermarry or eat together, and as to the distinction as regards customs and ceremonies between the members of the different classes who are vaishnabs or orthodox Hindus, and those who strictly adhere to the religious views of the Jains. These differences, may, however, very well exist at different places without affecting the uniformity of the custom. It is said that many of the witnesses who give [393] instances of adoptions by Jain widows at Arrah or elsewhere speak from hearsay and cannot also say whether the adoptions were made with or without permission. It would not be reasonable to expect definite evidence on the latter point. If no permission is necessary it is not likely that there would be any discussion on the question whether permission was or was not given. It was as easy for the plaintiff to show that permission was given in any particular case as for the defendant to show that it was not given, but I think the only instance in which it is distinctly said that permission was given is in the adoption by Musstt. Tuktuk Koer at Arrah, and that appears from the evidence of the defendant's witness, Sheo Pershun Lall. As, however, his daughter had married the adopted son, it was perhaps too much to expect that by saying that the adoption was without permission, he would shut every loophole of escape if the custom to which he spoke was held not to be proved and the adoption was afterwards disputed. As

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Musstt. Tuktuk's husband died in 1843, and the adoption does not appear to have been made till about 1887, it is not very likely that it was made in pursuance of permission. We have no doubt that a widespread belief in the custom existed and was acted on, and it is a strong and singular circumstance that in the only three instances in this part of India in which an adoption by a Jain widow appears to have been disputed, the adoption was upheld by the Courts on the ground that the husband's permission was not necessary.

We see also no reason to dissent from the decision of the Subordinate Judge that a childless Jain widow acquires by the other custom alleged an absolute right to her husband's property when it is his separate property, and it is not necessary to go any further in the present case. There is in the evidence no reason for drawing any distinction between ancestral and self-acquired property, and we see no ground for distinction. We do not, however, consider that the two customs must stand or fall together. They seem to us quite independent. The custom by which the widow can adopt without her husband's permission does not in any way depend upon the nature of the estate which she takes from her husband. Whether she took an absolute or qualified estate, the evidence is uniform that the [394] adopted son acquires the same right to the property as her husband had, although there is some slight difference of opinion as to the extent of the control, which she may retain over it. Even, therefore, if this custom fails, Bhagwan Das, if adopted, acquired a good title to the properties. The facts in this case are very similar to those in *Sheo Singh Rai's* case, although there is no connection between them either in point of time or place. Here, as there, the widow, notwithstanding the adoption, reserved to herself the estate, but here she subsequently made it over to her adopted son under a deed of gift. It is not necessary to determine in this case any more than in *Sheo Singh Rai's*, whether the effect of the adoption was to divest the widow, and it is immaterial, if there was an adoption, whether Bhagwan took as adopted son or under the deed during the lifetime of Misri Koer.

It is, however, very strongly contended for the appellants that the custom of the Jains, whatever they may be in other places, did not apply to the Jains of Arrah who are governed in all matters of succession and adoption by the Mitakshara Law, and that the conduct of Jinwar and other members of the family shews that the alleged customs did not prevail. We see in the evidence no sufficient foundation for the contention that there is any difference in the customs observed at places east and west of Cawnpur. The Arrah witnesses and some witnesses of other places were examined at great length as to the ceremonies observed on death, marriage, adoption and other occasions, and as to the worship of Hindu deities with a view to show that there was no real difference in those respects between the Jains and the orthodox Hindus. We think it is unnecessary to enter upon any criticism of that evidence. It may be conceded that in ceremonials the practices vary at different places and even in Arrah itself, and that the views of some Jains are much stricter than those of others. It may be conceded also that their ceremonies in many respects approximate pretty closely to those of the orthodox Hindus, although this is not confined to Arrah itself. The reason is pretty obvious. The Jains have no written *shastras* and no priests of their own. Brahmans are called in to officiate at their ceremonies, and it is only natural that they should perform the ceremonies with which they

are best [395] acquainted. The whole matter may be pretty well summed up in what the defendant said when asked according to what custom the marriage would be performed, if the bridegroom was a Jain and the bride a Vaishnab. His reply was that the officiating priest was a Hindu Brahmin and does what he pleases, and that he would do so even if the bride and bridegroom were both Jains. But there is this fundamental distinction between the Jains and the orthodox Hindus that their belief in the nature of the future state is wholly different; a son among the Jains confers no spiritual benefit on the state of his deceased father, and the Jains do not believe in or observe the Sradh ceremony as it is observed by the orthodox Hindus. Some Jains also may worship or do homage to some of the Hindu deities, but they have their separate temples which no orthodox Hindu would enter, and their separate deities whom no orthodox Hindu would worship. Mere approximation in the observance of ritual or ceremonies does not, therefore, do away with the difference which exists between them, and we see nothing to differentiate the Jains at Arrah from the Jains elsewhere, as regards the observance of any customs peculiar to them or indeed in any other respect, save perhaps this that where the Jain communities are larger and more connected there may be less of the ordinary Hindu ritual. Of the plaintiff's Arrah witnesses four are Agarwalla Jains and three are Agarwalla Vaishnabs, and all but one are related to or connected with him. They state generally that the Arrah Agarwallas are governed in matters of succession and adoption by the Mitakshara Law, but their statements are contradicted by the evidence of the defendant's witnesses who are more numerous and on the whole more independent. They give some instances of sales or alienations by widows, but in only four instances are the deeds produced. These are (1) the will of Sriuns Koer in 1884 (Ex. PP), (2) a kobala by Mundir Koer in 1882 (Ex. HH), (3) a kobala of Tuktuk Koer and another in 1873 (Ex. Z) and (4) another kobala of hers in 1892 (Ex. V). They also give some instances of adoptions by widows, but these are open to the observation that some of them are comparatively recent and the widow is still alive. This is so in the case of Binda Bibi, Mohan Koer and Tuktuk. In the two former cases the witnesses can only say they heard there was no permission or that [396] they never heard of any permission and they could not be expected to say any more. Tuktuk's case has been already referrred to. One witness Nanuk Chand says he was himself adopted by a widow some 13 years ago, but his position is not a very high one. Two other adoptions by Madhun Bibi and the widow of Mohan Koer are spoken to as having taken place long ago, but the evidence as to the former is very vague, and as to the latter the evidence of the adopted son, who is said to be still alive but old, would have been the best evidence. It is not of course to be expected that there would be many instances of Jain widow adoptions in a small community like that of Arrah. The evidence on the whole leads us to the conclusion that the customs applied to the Jains at Arrah just as much as the Jains elsewhere, and Misri Koer was evidently of the same opinion in 1857 when she made and registered her will (Ex. D).

It is said, however, that the conduct of Bhagwan and other members of the family is opposed to this conclusion, and shews that the Mitakshara Law applied in every respect. In 1891, at the time of the census, a memorial (Ex. 1) was submitted to the Bengal Government representing that the Jains ought not to be classed in the returns as a people separate from the Hindus. This was signed by Bhagwan, his son, the defendant, the plaintiff's witnesses Nos. 3, 5 and 10, and the defendant's witnesses

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Nos. 3, 8, 22, 27, 67 and 68. It represents that there was no difference between the Jains and the Hindus except on the matter of religion, that they observed the Sradh and other Hindu ceremonies, that they never had or required any separate law of inheritance, and that, if they were going to be distinguished from the Hindus, complications might arise in the disposition of their property. No doubt they all agreed in the desire that they should not be classed separately from the Hindus as a race, but a perusal of the evidence will shew that they cannot be fixed with any knowledge of the contents of the memorial which was written in English. It is not true that they observed the Sradh in the sense in which the Hindus observed it, and it was quite unnecessary to say anything about the law of inheritance. The persons who got up the memorial have not been examined, and it is easy to understand how signatures were obtained, only the direct object of the memorial being made known.

[397] Exhibits 12, 13, 14 and 15 and H, all of the year 1893, have been referred to as showing that Bhagwan Das and the defendant always claimed to be subject to the Mitakshara Law, but the defendant admits being subject to the Mitakshara law except as to special matters which were regulated by the customs of the Jains. There was no necessity in the matters to which those exhibits relate to mention any custom. Then Jinwar Das's first cousins Jago Mohan and Mansubrit Singh were joint in estate. Jago Mohan died in 1847, leaving a widow Kanta Koer, and after his death Mansubrit got his name registered as proprietor of certain of the joint properties ignoring Kanta Koer. So also Jinwar and his brother Munni Lall were joint, Munni Lall died in 1840 leaving a widow Sriuns Koer. In 1845 Jinwar got his name registered as proprietor of certain properties ignoring Sriuns. It is said that these acts are opposed to the alleged custom according to which Kanta Koer and Sriuns Koer would have respectively taken their husband's share. That would be so in appearance at least if the custom extended to the husband's undivided as well as to his separate property, a question which we do not consider it necessary to decide. The acts can be taken at the most as an indication that the rule of survivorship prevailed. But whatever happened during the lifetime of the surviving brother, it is clear that after his death his widow recognized the widow of the other brother as entitled to a share. In 1851 Kanta Koer, Tuktuk Koer and their mother-in-law Munder Koer came to an agreement, and divided the property which belonged to Jago Mohun and Mansubrit into three shares each taking one. So also after Jinwar's death Misri Koer never denied the right of Sriuns Koer to a half share. In 1853 she got her name registered for her husband's half share only, stating that the other half belonged to Sriuns. The latter it is true was not satisfied and wanted the whole on the ground that Misri was a childless widow. The two ladies were for some time on bad terms, and in 1864 Misri brought a suit for partition, the result of which we do not know. The other three ladies also got involved in some litigation, but it is unnecessary to follow all their squabbles as we think they have no bearing on the case. In the proceedings to which we have been referred there was no necessity to refer to or rely on [398] any customs. It is sufficient to say that after the death of Kanta and Munder, Tuktuk seems to have got the shares which they held. In 1870 Sriuns got her name registered for the half-share which Jinwar and Bhagwan always admitted to be hers. There is no trace of any further disagreement after that, and in 1884 Sriuns made a will by which she gave certain property to Bhagwan Dass and the

rest to her daughter's sons. She, like Misri, asserted a right to deal with the properties as she l ked. 1899 SEP. 6.

On the first question we find that Misri Koer could, according to the Jain custom, adopt a son without her husband's permission, and that she took an absolute right to his separate property. APPELLATE CIVIL.

On the second question we have no doubt that Bhagwan Das was actually adopted by Misri Koer that the adoption was to her husband, and that Bhagwan acquired a good title to the properties. Whether he did so at once on the adoption notwithstanding that Mirsi Koer professed to retain her right to the properties, it is unnecessary to decide. In the documents D, E, F, and G, executed and registered by Misri Koer in the years 1857, 1866, 1871 and 1877, she positively asserts the fact of the adoption and treats him as her adopted son. She first makes a Will in his favour—then she erects a Jain temple, endows property to it, and appoints Bhagwan to be the manager. Then she makes over to him absolutely as adopted son money and ornaments, and finally she makes over all her property. The evidence shows that Bhagwan was brought from Benares when about 8 years old, and that he lived afterwards with Misri, severing entirely his connection with his own family. He was of Vaishnab parents, and in some of the deeds above referred to she says she brought him up as a Saraogi, which was her religion and that of her husband. Exhibit C shows that the parents parted with the boy; and when there was a *bona fide* intention to adopt, there is not the least ground for supposing that the adoption ceremony considered necessary was not performed. Three witnesses swear that such a ceremony did take place in their presence and the Subordinate Judge believed them. One of them is Sundar Das, a man of 70, whose sister was married to Jinwar Das, and who was certainly in a position to know. The [399] other two were also men of mature age at the time of the adoption. On the plaintiff's side there is only one witness, whose age might have been 10 at the time of the adoption ; the others were all infants or unborn. There is not even the negative evidence of persons who could say that they never heard of such a ceremony, although they must have known of it, if it had taken place. 27 C. 379.

It is said, however, that the adoption, if any, was to Misri herself and not to her husband. There is not a suggestion in the voluminous evidence in this case that when a Jain widow adopts without permission she adopts to herself only. Misri herself declared more than once that she made the adoption to perpetuate the name and prestige of herself and her husband, and that is a pretty clear indication of what her intention was. The fact that after the adoption she still considered herself the owner of the properties affords no reasonable indication to the contrary, and the widow in *Shoe Singh Rai's* case did the same. The transaction must be looked at from the point of view of those who were concerned in it, even if it was a mistaken view. It is true that in a plaint of 1875 (Ex. 20) Misri described herself as widow and heir of Jinwar, that in 1877 (Ex. 37a) Bhagwan described himself as adopted son of Misri Koer, widow and heir of Jinwar Das, and that he gave himself the same description in certain plaints filed in 1875, 1882 and 1883 (Exs. 34—36).

In a deposition of 1883 (Ex. 28) he calls himself, however, the son of Jinwar Das, and we find him so described in an earlier document of 1874 (Ex. BB.) These are not, we think, matters of much importance, especially when Misri Koer considered, rightly or wrongly, that the adoption did not at once divest her.

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We must admit that we regard with considerable suspicion the evidence of the permission to adopt given by the witnesses, who say they were present at the adoption ceremony. It looks like an after thought to fill up what might be a weak place. It is evidence which could not be contradicted, and it is very significant that Misri, although she several times mentioned the adoption, never referred to it as having been made with permission. This is not evidence upon which we should be prepared to act, if evidence is necessary; but the matter is immaterial in view of [400] the other conclusions at which we have arrived, and no Court would we think put a defendant to express proof of permission in respect of an adoption made more than 40 years ago and recognized ever since.

As regards the third question, Jugmandil, the plaintiff's father, lived next door to Misri Koer; their houses were only separated by a wall, and Jugmandil must have been, according to the plaintiff's account, Jinwar's nearest male relative. The plaintiff's mother's evidence shows that she and Misri were on good terms, and that they used to frequent each other's houses. Sunder Das swears that Jugmandil was presentat and tookan active part in the adoption ceremony, and in this respect we see no ground for disbelieving him. Misri was not making a surreptitious adoption, and Jugmandil, who was himself a Saraogi, may be assumed to know that she was not making an adoption personal to herself. Jugmandil must have known of the adoption, and the probability is extremely strong that he was, as Sundar Das says, present at the ceremony. Bhagwan was married in about the year 1862 to a girl of the Gya District. Madho Pershad, who is the brother of the girl's father, says that he negotiated for the marriage, that Jugmandil took an active part in the negotiation, and that Bhagwan was married as the son of Jinwar Das. Jugmandil was not present at the marriage which took place some nine or ten months after the betrothal, as he had then gone on pilgrimage. We see no reason to disbelieve the evidence of Madho Pershad and there is no improbability about it. In 1866, when Misri endowed property to the Jain temple and appointed Bhagwan manager, Jugmandil was one of the persons appointed to be a *punch*, and who were to take the management out of Bhagwan's hands, if he misconducted himself. We cannot suppose that Jugmandil was ignorant of this. The evidence shows that Bhagwan acted as *Samdhi* (1) at the marriage of the plaintiff and his sisters and we believe it. He could not have done so in any capacity other than that of Jinwar's son. There is also evidence that Bhagwan acted as *Kandhya* (2), at the funeral of members of the family, that he observed mourning ceremonies when any member, [401] of thefamily died, and that when he died the plaintiff and others went into mourning in the same way as they would have done for a relative. We have no doubt that he was throughout recognized as the adopted son of Jinwar and not merely as the adopted son of Misri Koer, that he ceased to be a gotra in his own family, and became a gotra of Jinwar. We entirely disbelieve the evidence for the plaintiff that Bhagwan was in Misri's house as a gomastha or a manager of her property. The evidence would go so far as to show that he was not even adopted by Misri. There is a mass of evidence, a good deal of it beyond suspicion, that Bhagwan was generally known and regarded as the adopted son of Jinwar. On these facts, especially the fact that he took part in the adoption ceremony, and in the marriage of Bhagwan, we

(1) [*Dadsali Samdhi*—Master of the ceremony — REP.]
(2) [*Kandhya*— Carrier or bearer.— REP.]

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think Jugmandil would have been estopped from denying the adoption. At all events no Court would listen to his objection that the adoption was invalid because made without the permission of Misri's husband, or call upon the defendant after 40 years to give proof of that fact. The plaintiff cannot be in any better position than his father.

We must hold also that the suit is barred under art. 129 of the Limitation Act IX of 1871, which provides that a suit to set aside an adoption must be brought within 12 years from the date of the adoption, or (at the option of the plaintiff) the date of the death of the adopted father. That Act was passed by the Governor-General in Council on 24th March 1871, but was not to apply to suits instituted before the 1st of April 1873. It was repealed by Act XV of 1877 which came into force on the 1st of October 1877, but the repealing Act did not revive any rights which were barred under the Act repealed. Jugmandil died on the 15th October 1875. The plaintiff was born on the 29th July 1873, and attained majority on the 28th July 1894.

The case of *Jagadamba Chaodhrain* v. *Dakhina Mohun Roy* (1) was brought while the Limitation Act (IX of 1871) was in force. Their Lordships, speaking of art. 129, say that the rational and probable principle to apply to the [402] Act is that of allowing a moderate time within which such delicate and intricate questions as those of adoption shall be brought into dispute, and that the article must be read as striking alike at all suits, in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession. They add that the expression 'set aside an adoption' is and has been for many years applied to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. In that case the plaintiff did not sue to set aside an adoption, but for the recovery of land of which the defendant was in possession as adopted son. It was held that the form of pleading was immaterial, and that it was enough, if the case raised the issue of the validity or invalidity of an adoption.

The case of *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (2) was brought when the present Limitation Act (XV of 1877) was in force, and it raised the question of the validity of an adoption made in 1851. Nothing appeared to turn on the question whether the defendant was or was not in possession as adopted son while time was running under the Limitation Act IX of 1871, but it was found that the adoption was openly and constantly asserted, and that the plaintiff had full knowledge of it, and had acknowledged or acquiesced in the assertion of the right. It was held that the suit was barred under art. 129, Act IX of 1871. Their Lordships say "the plaintiff had thus upwards of two years after March 1871, within which he might have brought his suit to set aside the adoption, and had notice under the statute that the period of limitation of twelve years from the date of the adoption would be applicable on the expiry of that time. Accordingly, on the 1st April 1873, no such suit having been raised, the plaintiff's right of action was barred."

This is not, we must admit, such a strong case as that, but we have found that the adoption was an adoption to Jinwar and not to Misri Koer alone, and that Jugmandil knew of it and assisted in it, and we think that

(1) 13 I. A. 84=13 C. 308. (2) 20 I.A. 30=20 C. 487.

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the fact that Bhagwan did not get actual [403] possession until 1877 when Jugmandil was dead, makes no difference.

It is argued that the plaintiff cannot be barred as he claims as heir of Jiowar Das on the death of his widow, and that he does not claim through his father Jugmandil, that he was not born till after the 1st of April 1873, and could not before that date have brought a suit to set aside the adoption. But, if the time for a suit to set aside the adoption was running, still less if it had expired, before the plaintiff was born, he would not get the benefit of the extended time allowed to minors under the Limitation Act. Under art. 129 time in this case commenced to run from the date of the adoption. A similar contention was raised in the case of *Siddhessur Dutt* v. *Sham Chand Nundun* (1) and overruled. The decision of the Subordinate Judge is in our judgment right, and we dismiss the appeal with costs. There is an issue in the case as to which of the properties were ancestral and which self-acquired. The matter was not considered in the lower Court nor was there any discussion upon it before us.

M. N. R. *Appeal dismissed.*

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27 C. 403 (P.C.)=27 I.A. 30=4 C.W.N. 453=2 Bom.L.R. 556=7 Sar. P.C.J. 669.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse and Davey and Sir Richard Couch.

[*On appeal from the Court of the Recorder of Rangoon.*]

AH SHAIN SHOKE AND OTHERS (*Defendants*) *v.* MOOTHIA CHETTY AND OTHERS (*Plaintiffs*).
[17th November and 9th December, 1899.]

Contract—Contract of sale—Want of assent—Broker's bought and sold notes.

To contract through a broker, to sell a quantity of paddy at a price stated, the plaintiff firm signed the sold note. This was taken by the broker to the defendant firm, of which a member, before signing the bought note, wrote in Chinese characters, not understood by the vendor, a term as to quality. This was to the effect that the paddy was to be without yellow grains and not wet.

A part delivery was made of paddy not answering this description. For this the defendant firm made a part payment at a reduced rate. Of the [404] rest they refused to take delivery, when tendered, because it was not of the quality contracted for.

Held, that the plaintiffs' suit for the balance of the price of the part delivered, and for damages for non-acceptance of delivery of the rest, failed.

If the plaintiffs—neither they nor their broker understanding Chinese—did not assent to the term written by the defendant, then there was no contract entered into to buy. If, on the contrary, the plaintiffs had assented to that term, then the paddy was not of the quality required by the contract.

APPEAL from a decree (16th September 1890) of the Recorder awarding damages.

The plaintiff-respondents sued the defendant-appellants for the breach of an alleged contract of the 6th September 1897 to take delivery of paddy, and sued also for the balance of a sum claimed to be due on a delivery of part taken under that contract. The arrangement, made through a broker, was for the purchase of from 35,000 to 40,000 baskets of paddy, of which 10,957½ baskets were delivered before the

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(1) 23 W. R. 285.

29th September. For this delivery Rs. 14,664 were paid, that being less thna the price claimed by Rs. 432 now sued for; the defendants having deducted that amount on account of the quality of the paddy alleged by them not to be according to the contract. For the same reason the defendants refused to take delivery of the rest, which was tendered before the 6th October.

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The first defendant, Ah Shain Shoke, to whom the signed sold note was taken with the bought note for his signature for paddy of the usual quality, wrote upon the bought note, before signing it, words in the Chinese language to the effect that paddy with yellow and wet grains would not be taken. When the broker returned both the bought and sold notes to the vendors, who did not understand Chinese, no notice was taken of any additional term. The paddy contained yellow grains.

The facts are stated in their Lordships' judgment.

The Recorder found that a contract was made through the broker as evidenced by the bought and sold notes for paddy of the usual quality, and that the produce delivered and tendered came up to this quality. In effect, his judgment was that there was a [405] contract between the parties, not altered by the addition of the Chinese words, which had represented nothing to the vendors.

Mr. *A. Phillips*, for the appellants.—There was error in the Recorder's judgment. There had been no completed contract effected by the broker. The bought and sold notes should have been evidence of it; but it was clear that the defendant firm had never assented to the proposal made to them to accept paddy of the usual quality, without any exclusion of wet paddy, and with yellow grains. If, as had been decided by the Recorder, the term as to these things, to which the defendants objected, had not been introduced, then the parties were not "*ad idem.*" The one party had offered, and the other party had not accepted, the offer. The addition of the Chinese characters to the bought note had been treated below as not affecting the claim, because they had been unintelligible to the opposite party. But either a new term had come in, and was, in the event, not complied with, or else there had been no contract at all.

Mr. *Haldane*, Q.C., Mr. *F. McCarthy*, and Mr. *R. S. Giles*, for the respondents, argued in support of the judgment below. The complete contract was expressed in the brokers' notes, the bought note containing some writing in Chinese, unintelligible to the vendors, and to the broker who brought back the notes; and these notes gave no intimation of a new term sought to be introduced.

Thus the sale was established of paddy of the usual quality; and the plaintiffs had fulfilled all that was required of them by their contract.

Mr. *A. Phillips* was not heard in reply.

JUDGMENT.

Afterwards, on the 9th December 1899, their Lordships' judgment was delivered by

SIR R. COUCH.—The suit in this case was brought by the respondents against the appellants for a breach of contract in not taking delivery of a large quantity of paddy sold by the [406] former to the latter on or about the 6th September 1897. The defendants had taken delivery of part of the paddy sold and paid Rs. 14,664 on account of it, being Rs. 432 less than the amount of the contract price for it, and the plaintiffs claim this sum and Rs. 17,448-15-9 as damages for not taking delivery of the remainder. The defence was that the contract was

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for the purchase of 35,000 to 40,000 baskets of paddy on the terms and conditions set out in the written contract embodied in bought and sold notes, that the quality of part of the paddy which was taken delivery of was objected to, and a reduction of eight rupees per 100 baskets was agreed to by the respondents, and the quality of the remainder of the paddy which the appellants refused to take delivery of was not according to the contract. The suit was tried before the Recorder of Rangoon and the following facts were proved at the trial. The appellants are a firm of Chinamen trading in Rangoon under the name of Shain Leong, and the respondents are traders and money-lenders carrying on business there. The contract was made through a broker named Oothooman, the price after some negotiation being fixed at Rs. 138 per 100 baskets. He had bought and sold notes written by one Moideen which were in English and were copied from another contract altering the names. The sold note was signed by Ramanathan and Patail, two of the respondents, and was then taken away by Oothooman. He and Moideen then went to the defendants' house and gave both the bought and sold notes to Ah Shain Shoke, who called a clerk Lok Shain and asked him to read the contract. After he had read it, Ah Shain Shoke refused to sign, unless it was inserted that yellow and wet grain would not be taken. He wrote on the bought and sold notes in Chinese and signed the bought note and gave it to Oothooman who went with Moideen to Patail's house and gave it to him. It had on it in Chinese "Yellow rice will not be accepted, will not accept if it is wet." The respondent did not know Chinese and none of them noticed the writing till after the dispute. The paddy contained a sufficient quantity of yellow grains to make it not in accordance with the Chinese addition to the bought and sold notes, and Rs. 8 per 100 baskets was a reasonable reduction to be made in the contract price on account of the yellow grains. Moothia Chetty, one of the respondents, said in his evidence he **[407]** did not consider the contract as concluded until bought and sold notes were signed. He was right in this. They were the only evidence of the contract. As signed by the appellants the bought notes contained the term that there should be no yellow grains. If the respondents did not assent to this and insisted on the sold note signed by them being without that term, the notes would not agree and a contract would not be proved by them. If the respondents did assent they did not perform their part of the contract by offering paddy which was free from yellow grains. In either case the decree appealed from which gives to them the whole of their claim is erroneous, and their Lordships will humbly advise Her Majesty to reverse it and order the suit to be dismissed with costs. The respondents will pay the costs of the appeal.

Solicitors for the appellants: Messrs. *Sanderson, Adkin & Lee.*

Solicitors for the respondents: Messrs *A. H. Arnold & Son.*

C. B.

27 C.407 (P.C.) = 27 I.A. 33 = 4 C.W.N. 533 = 2 Bom. L.R. 5 = 7 Sar. P.C.J. 657.

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27 C. 407 (P.C.) = 27 I.A. 33 = 4 C W.N. 533 = 2 Bom. L.R. 5 = 7 Sar. P.C.J. 657.

PRIVY COUNCIL.

PRESENT:

Lords Morris, Davey, and Robertson, and Sir Richard Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

TARA LAL SINGH (*Appellant*) *v.* SAROBAR SINGH AND OTHERS (*Respondents*). [14th November and 9th December, 1899.]

Land Tenure—Sale of an under-tenure in execution of decrees for arrears of rent—Act VIII of 1865*—Execution—Attachment—Sale proclamation—Joint interest of three brothers in joint possession validly sold.*

A zemindar brought to a judicial sale an under-tenure in execution of three *ex parte* decrees obtained by him for arrears of rent thereof, for different periods. The property was held by three Hindu brothers in joint possession. The zemindar purchased it at the sale.

At the instance of the zemindar execution had been issued against only one of the brothers. Another of them, referring to this, afterwards disputed the validity of the sale, and claimed his one-third share, alleging, as the fact was, that the decrees had not, each and all of them, been against each and all of the three brothers, and that the sale was invalid. One at least of the three decrees was against the three brothers, who all understood that they were judgment-debtors under the decrees. They had been served with **[408]** proper notices under Act VIII of 1865, and separate attachments of the land under each decree, and separate proclamations of sale thereunder, had been made.

Held, that the sale was a valid one, and operated to transfer the tenure to the purchaser.

[R., 28 B. 393 (397) = 6 Bom. L. R. 417; 12 Bom. L. R. 539 (542); 16 C.L.J. 197 = 17 Ind. Cas. 165 (166); 19 C.L.J. 182 = 22 Ind. Cas. 280.**]**

APPEAL from a decree (2nd March 1896) of the High Court, reversing a decree (30th September 1893) of the Subordinate Judge of Manbhum.

The appellant represented his father the late Raja Nilmoni Singh Deo Bahadur, against whom this suit was brought on the 2nd June 1890 by Gadadhar Singh, who died after the decree of the High Court, in his favour, and was now represented by his brother Sarobar Singh, the first respondent.

The claim was for a declaration of Gadadhar's proprietary right and for possession of a one-third share of ten villages held, before the proceedings now in question, as a jaghir tenure under the Raja by the plaintiff and his two brothers Chatradhari Singh (now deceased and represented by his son Shumbonath Singh), and Sarobar who were joint in estate. This under-tenure had been attached and sold under, and in conformity with, Bengal Act VIII of 1865, in execution of three *ex parte* decrees for arrears of rent (Act X of 1859) obtained by the late Raja against the brothers. The first of these decrees was dated 3rd December 1870, and was for rent of the tenure, from April 1866 to April 1869, against defendants Chatradhari and Gadadhar, the latter of whom got this decree afterwards struck off as against him. The second decree was dated the 2nd September 1874, for rent from 1870 to 1873 against Chatradhari alone. The third decree, dated 13th April 1877, was for rent from April 1873 to April 1876 against the three brothers, together defendants.

In June 1878 the Raja, holding the three decrees, applied for and obtained an order for execution of them against Chatradhari alone. Proceedings were then taken under Act VIII of 1865, regulating the sale of under-tenures for arrears. Attachment, proclamation of sale, and notices

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took place. Order for sale was made by the Deputy Commissioner as Collector of Manbhum, and on the 15th July 1879 the villages were put up for sale in execution of the decrees. The Raja became the purchaser for Rs. 7,000, and [409] to him a sale certificate was issued on the 28th October 1878. The Commissioner of the Division dismissed an appeal from the order of sale, and the Board of Revenue confirmed it.

The question now was whether the execution ending in the sale was valid, and rendered it effectual: This had been raised by the issues fixed by the Subordinate Judge at Purulia, as well as one of limitation. On this latter point only he dismissed the suit as out of time, not having been brought within one year, under art. 12 of sch. II of Act XV of 1877.

On an appeal to the High Court by the Raja, a Division Bench (BANERJI and GORDON, JJ.) considered that the question of limitation did not arise. In their opinion the decree-holder had deliberately proceeded against Chatradhari alone, and the sale had been caused to be held in the execution case against the same defendant only. According to their view there was no valid sale of the plaintiff's interest in the under-tenure brought to sale. They treated the objection as not merely technical and decreed the claim.

Mr. *J.D. Mayne* and Mr. *J. H. A. Branson*, for the appellant.—The right decision would have been to hold that the sale in July 1878 was a sale under all the three decrees and in all the three execution cases.

If, indeed, there was an objection tenable in favour of Gadadhar's claim, on the ground of the striking off of the decree of 3rd December 1870 as against him, there still remained the decree of 13th April 1877 against all the three brothers together and the execution case upon that. Thus he remained liable at all events in these proceedings. The property might have been lawfully sold under the last decree. There had been nothing to limit the execution to Chatradhari's interest, or to render any of the proceedings a nullity. The issue of execution against Chatradhari alone was passed over, if irregular, in the subsequent proceedings, which made all the defendants fully aware that the property was to be sold in execution of all the three decrees against all the three brothers. The proceedings were regularly taken under Act VIII [410] of 1865, relating to sales of under-tenures for arrears. In execution proceedings the Court would regard the substance of the transaction, and if that were sound, as in the present case, a technical irregularity, or informality, would not affect the validity of the sale. *Bissessur Lal Sahu* v. *Maharaja Luchmessur Singh* (1). The execution in this instance became valid against all the three in the course of the proceedings, the attachment against their land, the sale proclamations, the notices, and the sale itself having all taken place. The sale, it was submitted, should have been declared valid.

The respondents did not appear.

JUDGMENT.

Afterwards, on the 9th December, their Lordships' judgment was delivered by

LORD DAVEY.—The suit out of which this appeal arises was one for possession of one-third share of certain mouzahs, the entirety of which had been sold by auction in certain execution proceedings in the year 1878. A similar suit was commenced by another claimant and the two suits were heard together. The validity and effect of these execution

(1) 6 I. A. 233.

proceedings is the matter in dispute. The following are the material facts:—

In and prior to the year 1870 three brothers named Chatradhari, Gadadhar and Sarobar were in joint possession of the mouzahs in question on a jaghir tenure under the late Raja Nilmoni (the predecessor in title of the present appellant). The Raja obtained three decrees in the Court of the Assistant Commissioner of Purulia: (1) No. 136 against Chatradhari alone for the rent of the mouzahs for the Fasli years 1293—1295; (2) No. 107 against Chatradhari and Gadadhar (misdescribed as Gungadhur) for the rent for the years 1297—1299; and (3) No. 1334 against all three brothers (Sarobar being misdescribed as Surleswar) for the rent for the years 1280-1282. All these decrees were obtained *ex parte*, the defendants in the several actions not appearing. On the 3rd June 1879, and after execution proceedings, Gadadhar obtained an order for restitution of suit [411] No. 107 to the Judges' list for trial, and it was ultimately struck out, so far as he was concerned, for default of the plaintiff. The decrees in No. 136 and No. 107 were therefore in effect against Chatradhari alone, and that in No. 1344 against the three brothers (subject to any question as to the misdescription of Sarobar).

The decree-holder applied for execution of these three decrees. The execution proceedings under No. 136 were numbered 225, those under No. 107 were numbered 224 and those under No. 1334 were numbered 226. The decree-holder appears for some reason to have wished to take out execution against Chatradhari alone. Some objection appears to have been made (though the Record does not contain the document, raising the objection or show by whom it was made) and the following orders were passed by the Deputy Commissioner:—

"Raja of Pachete, *Decree-holder v.* Chatradhari Singh and others, *Debtors.*

"I am of opinion that the objection, though in point of abstract justice of no real importance, must in point of law be allowed.

"(*a*) In each case when the application has not been made setting forth the names of actual parties the application must be amended.

"(*b*) A separate notice of sale for each decree must be made. This notice shall be hung up in (1) Mr. Renny's Court, (2) in the Collector's Court, (3) in the Subordinate Judge's Court, (4) in the Court of the Judicial Commissioner to whom a memo in English will be sent, (5) in one of the villages on the land, to wit, Assensole, (6) in the nearest village to the land.

"(*c*) The notice shall specify the name of the mouzah and pergunnah in which the under-tenure is situated, the rent payable, *viz.*, Rs. 671 per annum, and the entire amount (correctly calculated, and if both are agreeable admitted by signature of both parties) recoverable under the decree under which the under-tenure is to be sold.

"(*d*) In each copy of the notice (the copies for Mr. Renny's Court and the Collector's Court will be hung up not later than the 20th June) it shall be said that the sale shall take place on the 15th day of July 1878, at noon, in the Cutchery of the Collector.

"B. W. MORTON, D. C.

"The 15th June 1878."

"As the decree-holder does not choose to take out execution against all the persons against whom he obtained decrees, and only against Chatradhari Singh, it does not appear to me that he is bound to take out execution against all. He says Chatradhari Singh is the only man who has any right. [412] Decree-holder knows his own business best. In the notice the

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claims of all parties will be given, as the law directs this to be done. If the other men are real tenure-holders they may protest. I direct that they be served personally with notice of the proposed sale of the under-tenure.

"B. W. MORTON, D. C.

"The 21st June 1878."

It appears clearly from the language of these orders that the Deputy Commissioner had the several decrees before him, and that his order applied to each decree, and it must, their Lordships think, be assumed that his orders were complied with and the proper notices were given to the several defendants in suit No. 1334 as well as in the other suits so as to bind the interest of all these defendants.

The sale took place on the 15th July 1878, and the decree-holder was declared the highst bidder and purchaser of the villages at the price of Rs. 7,000. It is plain from the *rubokari* of the Court of the Collector confirming the sale that it was made in execution cases Nos. 224, 225, and 226. It is headed with those numbers. It mentions attachment was made separately of the said lands in the several cases numbered separately; that separate sale proclamations were published and that the three records were put up on the day fixed for the sale. There can therefore be no doubt that the sale was made in suit 1344, and there can be no doubt that the proper notices were given and proclamations made to bind all the defendants in that suit. There is no allegation or proof to the contrary in the present suits.

A sale certificate was issued to the purchaser on 28th October 1878. Before the granting of this certificate the three brothers on the 6th August 1878 filed a memorandum of objection for the purpose of having the sale set aside, and their first two grounds of objection are that the sale was made in three separate execution cases in which they were the judgment-debtors separately; each of them not being the judgment-debtor in each of these decrees. They also made objections to the regularity of the proceedings on the sale and raised certain questions as to the disposal of the purchase money.

The appeal of the judgment-debtors was dismissed by the Commissioner, and his judgment appears to have been confirmed by the Board of Revenue. Their Lordships do not think that this **[413]** judgment can be regarded as *res judicata* in the present suits, if, as the High Court has held, there was no sale of any thing but Chatradhari's interest, but the proceedings are important as showing that the three brothers understood that the sale was in all three decrees, and that they were all judgment-debtors and the property had been sold in execution of at least one judgment against them all. They also show that Sarobar recognized himself as the person sued, notwithstanding the mistake in his name on the record of 1344.

The present suit was commenced on the 2nd June 1890, and in his plaint the plaintiff alleged that the property was sold under decree No. 107 and the execution case 224 (without mentioning the other decrees and execution cases), and that inasmuch as that decree had been set aside, the sale on execution of it was void as against him. Their Lordships have already intimated the grounds upon which this contention cannot be maintained. The High Court have however held that having deliberately elected to execute the decrees against Chatradhari alone, and having after the sale chosen to have the sale treated as made in the execution 224, the decree-holder cannot be allowed to treat the proceedings differently and

support it as a sale of the interests of all three brothers. Their Lordships cannot accede to this reasoning. The learned Judges do not seem to have thought that if the sale took place and is to be treated as having taken place in execution No. 226, the sale would not be valid, but they seem to have thought that the decree-holder and the present appellant are in some way estopped from treating the sale as made under execution No. 226. It is not, however, a question of estoppel but of fact, and on this point their Lordships need not repeat what they have said. There can be no estoppel when the truth of the matter appears, as it does in the present case, on the face of the proceedings. And it is plain from their memorandum of objections that Gadadhar and Sarobar were not deceived as to the facts or prevented by any misstatement of the Raja from asserting any rights they may have conceived themselves to possess. On the whole their Lordships cannot find on this record that either in form or substance any injustice was done to Gadadhar or Sarobar and they hold that the sale passed the entirety of the property.

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[414] They will therefore humbly advise Her Majesty that the order appealed from be reversed, and the appeal to the High Court be dismissed, the parties bearing their own costs as in the first Court. As this is a pauper case there will be no costs of the appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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27 C. 414.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

SUJA UDDIN (*Petitioner*) v. REAZUDDIN AND ANOTHER (*Opposite Party*).* [4th December, 1899.]

Appeal—Order rejecting an application for restoring to the file an application to set aside a sale in execution of a decree—Civil Procedure Code (XIV of 1882), *ss.* 311, 588 (8) *—Execution proceedings—Dismissal for default.*

No appeal lies from an order rejecting an application to restore to the file an application to set aside a sale under s. 311 of the Civil Procedure Code, which has been dismissed for default.

[F., 6 Ind. Cas. 148 ; R., 3 C.L.J. 276 (277) ; 10 O. C. 353 ; 19 C.W.N. 25 ; D., 13 C. L.J. 153 (155) = 14 C.W.N. 573 = 5 Ind. Cas. 493.]

In each of these cases, the petitioner Suja Uddin applied under s. 311 of the Civil Procedure Code to set aside a sale in execution of a decree. He failed to appear, and the application was dismissed for default. He then applied under s. 623 of the Civil Procedure Code to restore the application to the file, but that application was also dismissed by the Munsif. The petitioner then appealed to the District Judge, who held that no appeal lay. He then appealed to the High Court.

Babu *Jatra Mohan Sen*, for the appellant.

Babu *Digamber Chatterjee*, for the respondents.

[415] A preliminary objection was taken that no appeal lay in each case.

* Appeals from Orders No. 69 and 74 of 1899 against the order of J. Windsor, Esq., District Judge of Burdwan, dated the 11th of January 1899, affirming the order of Babu Kedeareswar Moitra, Munsif of Burdwan, dated the 14th of October 1898.

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The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows:—

JUDGMENT.

A preliminary objection has been raised to the hearing of these two appeals (Nos. 69 and 74 of 1899) namely, that no appeals lie; and in support of this contention the case of *Raja Pudman* and *Singh Bahadoor* v. *Doorga Pershad Doobey* (1) recently decided in this Court has been cited. We think that the facts of the present appeals are similar to the facts of that case, and on the authority of this ruling and also of the rulings *Ningappa* v. *Sangawa* (2) and *Raja* v. *Strinivasa* (3), we dismiss these appeals with costs, which we assess at two gold mohurs in each case.

M. N. R. *Appeals dismissed.*

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27 C. 415=4 C.W.N. 557.

APPELLATE CIVIL.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Harington.

GAHAR KHALIPA BIPARI AND ANOTHER (*Judgment-debtors, Appellants*) *v.* KASI MUDDI JAMADAR (*Decree-holder*).* [24th November, 1899.]

Civil Procedure Code (Act XIV of 1882), s. 244—Question for Court executing decree—Question between decree-holder and judgment-debtor as to saleability or otherwise of an occupancy holding.

Under s. 244 of the Civil Procedure Code the question as to the saleability or otherwise of an occupancy holding between the decree-holder and judgment-debtor can be determined in the execution proceeding.

Durga Charan Mandal v. *Kali Prasanna Sarkar* (4) and *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (5), referred to.

[R., 9 C.W.N. 972; 5 Ind. Cas. 385.]

[416] THIS appeal arose out of an application for execution of a decree. One Kasimudi Jamadar obtained a decree for rent against Gahar Khalipa Bepari and another, and in execution of that decree attached certain immoveable properties of the judgment-debtor. The defence was that the properties could not be attached and sold, inasmuch as they were occupancy holdings, and not transferable by custom. The Court of first instance having held that under s. 244 of the Civil Procedure Code the judgment-debtors could not raise the question of saleability or otherwise of an occupancy holding in the execution proceeding, allowed the application. On appeal the learned District Judge confirmed the said decision. Against this decision the judgment-debtor appealed to the High Court.

Babu *Surendra Chunder Sen*, for the appellants.

Maulvi *Serajul Islam*, for the respondent.

The judgment of the High Court (MACLEAN, C. J., BANERJEE and HARINGTON, JJ.) was as follows :—

JUDGMENT.

MACLEAN, C. J.—The learned Judge in the Court below has stated with accuracy what the question in this case is. First, he says, the

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* Appeal from Order No. 158 of 1899, against the order of B. C. Mitter, Esq., District Judge of Faridpur, dated the 28th of February 1899, affirming the order of Babu Ashini Kumar Guha, Munsif of that District, dated 27th of July 1898.

(1) 4 C.W.N. 39. (2) 10 B. 433. (3) 11 M. 319.
(4) 26 C. 727. (5) 24 C. 355.

question is, whether as between the decree-holder and judgment-debtor, the question of the saleability, or otherwise, of an occupancy holding can be determined in the execution stage under s. 244 of the Code of Civil Procedure, and his conclusion is—it is stated at the end of his judgment—that "the point now under discussion could not be raised by the appellant tenant; or in other words, the question did not properly arise." I have the misfortune to differ from the learned Judge. It seems to me clearly a question arising between the parties to the suit, a question arising between the decree-holder and the judgment-debtor in the suit, in which the decree was passed and relating to the execution of the decree. This view is consistent with that held by this Court in the cases of *Durga Charan Mandal* v. *Kali Prasanna Sircar* (1), *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2). The appeal must be allowed, and the case remitted to the lower Court for retrial with this intimation of our opinion. [417] We assess the hearing fee at two gold mohurs; the costs to abide the result of the remand.

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APPELLATE CIVIL.

27 C. 415 = 4 C.W.N. 557.

BANERJEE, J.—I concur.

HARINGTON, J.—I concur.

S. C. G. *Appeal allowed; case remitted.*

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27 C. 417 = 4 C.W.N. 107.

APPELLATE CIVIL.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Harington.

BHOOPENDRA NARAIN DUTT AND OTHERS *(Plaintiffs)* v. ROMON KRISHNA DUTT *(Principal Defendant)*.* [30th November, 1899.]

Bengal Tenancy Act (VIII of 1885), ss. 52, cl. (6) and 188—Abatement of rent—Suit for rent by several joint landlords against one of the joint tenants, whether in such a suit the tenant can claim abatement of rent—Tenant, Meaning of.

The expression "tenant" in s. 52 of the Bengal Tenancy Act does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure: it means the tenant of the tenure and not one of many tenants.

In a suit for rent, brought by some of several joint-landlords against one of several joint-tenants for recovery of the plaintiff's share of the rent payable on account of the defendant-tenants' share of the tenure under a previous arrangement, such tenant-defendant cannot claim abatement under the provisions of s. 52 of the Bengal Tenancy Act.

THIS appeal arose out of an action brought by the plaintiffs for recovery of their share of the rent payable by the defendant. The allegation of the plaintiffs was that they were the part proprietors of a certain *taluk*, and that the defendant was one of the joint-tenants of the tenure in respect of rent which was claimed, and that by an arrangement the defendant used to pay his share of the rent separately; that he failed to pay the rent and hence the suit was brought. The defence *inter alia* was that the actual quantity of land held by the defendant was much less than what it was stated to be by the plaintiffs, and that therefore the defendant was entitled to an abatement of rent upon

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* Appeal from Order No. 449 of 1898, against the order of Babu Bulloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 8th of September 1898, reversing the order of Babu Shyama Churn Chuckerbutty, Munsif of Barnipur, dated the 15th of March 1898.

(1) 26 C. 727. (2) 24 C. 355.

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measurement. The [418] Court of first instance disallowed the objection of the defendant and decreed the plaintiffs' suit. On appeal, the Subordinate Judge reversed the decision of the first Court. Against this decision the plaintiffs appealed to the High Court.

Dr. *Ashutosh Mukerjee*, for the appellant.

Mr. *Caspersz* and Babu *Bidhu Bhusan Ganguli*, for the respondent.

The following judgments were delivered by the High Court (MACLEAN, C. J., BANERJEE and HARINGTON, JJ.)

JUDGMENTS.

MACLEAN, C.J.—In this case certain persons, as landlords, granted a lease of certain immoveable property to certain persons as tenants. By an arrangement between some of the co-sharer landlords and one of the co-sharer tenants who was entitled to a fractional share in the tenure, the latter has paid for many years past his share of the rent to the co-sharer landlords I have referred to, who are now suing him for arrears of his share of the rent. The co-sharer tenant now sets up for the first time, and after this long period of payment, that he is entitled to a reduction of rent in respect of a deficiency existing in the area of his tenure as compared with the area for which rent has been previously paid by him, and claims the benefit of s. 52, sub-section (*b*) of the Bengal Tenancy Act. The question we have to decide is whether or not, as a mere co-sharer in the tenure, he is entitled in this suit to which neither the other co-sharer landlords nor the other co-sharer tenants are parties, to ask for a measurement, and to obtain any reduction, if any deficiency be proved. The Munsif has held that he is not so entitled; the learned Subordinate Judge has reversed that decision; hence the present appeal by the plaintiffs, who are the fractional landlords.

The solution of the point turns upon what is the true meaning of the expression "every tenant" in s. 52 of the Bengal Tenancy Act; whether it applies only to a tenant of the entire tenure, or whether it includes a tenant who has only a fractional interest in the tenure and who claims the benefit of the section in a suit constituted as is the present. In my opinion the question ought to be answered in the negative.

[419] It has been held in this Court—I am referring to the most recent decision in the case of *Baidya Nath De Sarkar and another* v. *Ilim & others* (1)—that a fractional shareholder, I mean one of several joint-landlords owning a share, cannot bring a suit for enhancement of rent. That decision doubtless turned to a considerable extent upon s. 188 of the Act, but it is difficult to see why the principle, which evidently underlies s. 188, should not apply to the converse case of a co-sharer tenant claiming the benefit of s. 52 in a suit such as the present.

In my opinion the expression "tenant" in s. 52 does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure; it means the tenant of the tenure, not one of many tenants. To hold that, in a case of this class it applied to a co-sharer tenant would result in much confusion, and almost endless litigation. For, if such were the true construction, every co-sharer landlord and every co-sharer tenant might possibly bring separate suits under this section. That can scarcely be. This view inflicts no injustice upon the co-sharer tenant, who can bring a suit under sub-section (*b*) of s. 52 of the Act for the purpose of having the rent reduced on the ground of deficiency in the

(1) 25 C. 917.

area, if, as I think he must, he make all the joint-landlords and all the joint-tenants parties to the suit.

On these grounds I consider the view taken by the Munsif was right, and that this appeal must be allowed with costs.

Banerjee, J.—I am of the same opinion. The question raised in this suit, which was brought by some of several joint-landlords against one of several joint-tenants for recovery of the plaintiff-landlords' share of the rent payable for the defendant-tenant's share of the tenure under a previous arrangement, is whether the tenant-defendant can claim abatement under the provisions of s. 52 of the Bengal Tenancy Act in such a suit. The first Court answered that question in the negative and gave the plaintiffs a decree at the old rate of rent. On appeal by the tenant-defendant, the lower appellate Court has answered the question in the affirmative, reversed that decree, and remanded the case to [420] the first Court. And against this decision of the lower appellate Court the present appeal has been preferred by the plaintiffs.

The contention on behalf of the tenant-defendant was that he was entitled to abatement of rent under cl. (*b*) of sub-s. 1 of s. 52 of the Bengal Tenancy Act. That clause provides that "every tenant shall be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been previously paid by him, &c., &c., and the question is whether the term "tenant" there includes one of several joint-tenants, the term rent, "any portion of the rent" and the term "tenure" a share of a tenure.

Evidently the language of the section is in favour of the appellants' view. Then is there anything in reason or justice which would support the defendant's contention and justify our holding that a tenant-defendant in a suit like the present is entitled to claim the benefit of this clause. The only reason which the learned Counsel for the respondent has been able to point out is, that if his contention be not accepted, then the result will be that great difficulty will be thrown in the way of a tenant's obtaining abatement of rent when he is circumstanced as the defendant is in the present case, where he is one of several joint-tenants holding a tenure under several joint-landlords, who have been in separate receipt of rent. But I do not think there is any real hardship in the case, so far as the tenant-defendant is concerned. It is always open to him to bring a suit for abatement of rent, making all the joint-landlords, and his co-sharers in the tenancy parties to the suit; and he can obtain abatement, if his case is well-founded. On the other hand to accept the respondent's contention as correct would result in much inconvenience and many anomalies. For, in that case the plea of abatement may be raised in every one of the suits, which the several joint-landlords may bring against the several joint-tenants, and as the judgment in none of these suits would be evidence in any of the others, the Court will have to try the question of abatement as often as there are suits brought. and it may be, with as many varying results, according to the nature of the evidence adduced in each case. The contention on behalf of the appellants, therefore, is in accordance not [421] only with the words of the section relied upon, but also with the spirit of the law and with reason and justice.

I may add that, so far as the landlord's right to claim enhancement or increase of rent is concerned, that right can be claimed only in a suit brought by all the joint-landlords. It is true that under the Bengal Tenancy Act that is so under the express terms of s. 188 of that Act; but

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under the law as it stood before the passing of the Bengal Tenancy Act, the rule was the same, and the rule was based upon considerations of justice. And if that was so, there is no reason why similar considerations should not be given effect to in the converse case of a tenant seeking to obtain against one of several joint landlords abatement of rent, though such a case may not be provided for by any express provision of the Tenancy Act applicable to it.

HARINGTON, J.—I am of the same opinion. In the absence of any express power given under the Act to a person having a share in a tenancy to exercise the rights which are given by the Act to a tenant, I think that the principle which obtains in the case of a joint-landlord being unable to sue except jointly must obtain. I can see no difference in principle and for that reason I think this appeal must succeed.

S. C. G. *Appeal allowed.*

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27 C. 421 = 4 C.W.N. 122.

APPELLATE CIVIL.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee, and Mr. Justice Harington.

DENO NATH SANTH (*Plaintiff*) *v.* NIBARAN CHANDRA CHUCKERBUTTY AND OTHERS (*Defendants*).* [28th November, 1899.]

Interest—Mortgage Bond—Failure to pay on due date—Stipulation for the payment of enchanced interest from date of default till date of realization.—Whether such stipulation is a penalty where a sum is mentioned in the contract as the amount to be paid in case of a breach of the contract—Contract Act (IX of 1872), *s.* 74.

In a mortgage bond where the parties are adults, the provision as to interest was to the following effect: "On account of interest of the said sum [422] of money, you shall take the profits of the said lands, and I will pay Rs. 20 per annum as the balance of interest from year to year by getting the said amount endorsed on the back of this document; and if I fail to do so, then at the end of the year the said amount of interest shall be added to the principal; and for the total amount whatever it will be I will pay up to the date of repayment at the rate of ½ anna per rupee per mensem."

Held, that inasmuch as what was specified in the contract was only the enhanced rate of interest, while no definite amount was specified as being payable in the event of a breach, nor could it be said that the amount, though not expressly stated in definite terms, was an ascertainable and definite amount which could become payable at the date of the breach, the stipulation for the payment of enhanced interest did not come within the scope of s. 74 of the Contract Act.

Mackintosh v. *Crow* (1) and *Wallis* v. *Smith* (2) referred to.

[R., 29 C. 823 (827); 30 C. 15 = 7 C.W.N. 876; 31 C. 233 (235); 25 M. 343 (345) = 11 M.L J. 421; 36 M. 229 = 18 Ind. Cas. 417 (435) = 24 M.L.J. 135 (165) = 13 M. L.T. 20.]

THIS appeal arose out of a suit for redemption. The plaintiff, who was the purchaser of the equity of redemption of an usufructuary mortgage, deposited a certain sum of money in Court to the credit of defendant No. 3, the mortgagee, being the principal and interest due upon the mortgage bond, and prayed that a decree for redemption be made. The defendant

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* Appeal from Appellate Decree No. 132 of 1898, against the decree of Babu Rajendra Kumar Bose, Subordinate Judge of 24 Pergunnahs, dated tht 15th of December 1897, modifying the decree of Babu Shama Kanta Nag, Munsif of Diamond Harbour, dated the 22nd of May 1897.

(1) 9 C. 689. (2) (1882) L.R. 21 Ch. Div. 243.

No. 3, on the other hand, urged that he was entitled to get more money than what was deposited by the plaintiff, the stipulation for interest in the bond being enforceable in law. The stipulation was to the following effect:— 1899 Nov. 28.

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"On account of interest I will pay annually Rs. 20 left after deduction of the proceeds of the said lands, and get the payment endorsed on the back of this document; if I fail to do so the said money on account of interest shall be considered as principal, and I will pay interest on the total amount of money, whatever it will be, at the rate of half-anna per rupee per mensem up to the time of payment."

The Court of first instance, relying upon the case of *Baidnath Das* v. *Shamanand Das* (1), held that the stipulation to pay compound interest was not enforceable by law, and gave the plaintiff a decree. On appeal, the learned Subordinate Judge reversed the decision of the first Court. Against this decision the plaintiff appealed to the High Court.

[423] Babu *Saroda Charn Mitter* and Babu *Shyama Prasanna Mozumdar*, for appellant.

Babu *Charu Chunder Ghose*, for respondent.

The judgment of the High Court (MACLEAN, C. J., BANERJEE and HARINGTON, JJ.) was as follows:—

JUDGMENT.

MACLEAN, C.J.—The question in substance which we are called upon to decide is whether, or not, we should allow to the mortgagee, under the mortgage, which is set out in the Paper Book, a less amount in the shape of interest than he alleges is stipulated for by the contract, and we are asked by the mortgagor to do this by putting in force the equitable principles of s. 74 of the Contract Act.

The parties in this case are adults, they made their own bargain, and as regards interest, the contract runs in these terms: "On account of interest of the said sum of money, you shall take the profits of the said lands, and I will pay Rs. 20 per annum as the balance of interest from year to year by getting the said amount endorsed on the back of this document, and if I fail to do so, then at the end of the year the said amount of interest shall be added to the principal; and for the total amount whatever it will be I will pay up to the date of repayment interest at the rate of ½ anna per rupee per mensem."

It is urged for the appellant that the provision for the payment of this additional interest is, upon the construction of the document, a penalty, and that, being a penalty, it is open to the Court, under the provision of the section to which I have referred, to give a less amount than that stipulated for by way of reasonable compensation.

The question of whether in cases of this class the payment which is stipulated for is by way of penalty or of liquidated damages is often a somewhat perplexing one, as is illustrated by the variety of authorities upon the point in the Courts of England; but s. 74 of the Contract Act was intended, as I understand, to do away with the distinction between a penalty and liquidated damages as was pointed out by Mr. Justice Wilson in the case of *Mackintosh* v. *Crow* (2), and to determine the perplexity. I am not quite satisfied that the latter result has ensued.

[424] Now, upon the best consideration that I have been able to give to the construction of the mortgage in this case,—and in each of

(1) 22 C. 143. (2) 9 C. 689.

1899 Nov. 28. — Appellate Civil. — 27 C. 421 = 4 C.W.N. 122.

these cases, the decision of the question depends, in effect, upon the construction of the document, and upon ascertaining what the parties really intended by it—I do not think that the provision can be regarded as a penalty. The bargain may have been a stringent one, but the parties made it, and they were competent to make it, and the language to my mind only shows that in certain events, and under certain circumstances, a certain amount of interest was to be paid. Unless this is to be regarded as a penalty—a view I have negatived—this is not a "sum named in the contract as the amount to be paid in case of such breach," and s. 74 does not apply. As was pointed out by Sir George Jessel, Master of the Rolls, in the case of *Wallis* v. *Smith* (1) Courts of Law should be chary about interfering with the contract made by the parties. His Lordship says: "It is of the utmost importance, as regards contracts between adult persons not under disability, and at arms length that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrate (overrule?) any clearly expressed intention on the ground that the Judges know the business of the people better than the people know it themselves."

In this view I do not propose to go through the rather numerous authorities to which our attention has been directed, and for the simple reason that each of these cases depends upon the actual language used in the contract, and what, upon the construction of that language, was the true bargain between, and intention of, the contracting parties. Whilst I do not propose to go through those authorities, I may perhaps say that I agree in the view of the law as laid down by Mr. Justice Wilson in the case of *Mackintosh* v. *Crow* (2) to which I have already referred. Upon these short, but I think, sufficient grounds, the appeal fails and must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. We are asked by the learned Vakil for the plaintiff-appellant, to hold that the [426] stipulation relating to the payment of interest at an increased rate is not enforceable, *first*, because the case comes within the scope of s. 74 of the Contract Act, and the creditor is entitled, not to the sum named in the contract, but only to reasonable damages, and, *secondly*, because, even if the case did not come within the scope of that section, still, having regard to the nature of the contract, we should hold upon equitable principles that it is not enforceable, and that the mortgagee is entitled only to reasonable compensation.

In support of the first branch of the contention the cases of *Kala Chund Kyal* v. *Shib Chunder Roy* (3), *Ramendra Roy Chowdhury* v. *Serafuddin Ahmid* (4), and *Manoo Bepari* v. *Durga Churn Saha* (5), are especially relied upon and in support of the second branch of the contention the case of *Pardhan Bhukhan Lal* v. *Narsing Dyal* (6) is cited.

I am of opinion that the stipulation for the payment of enhanced interest in this case does not come within the scope of s. 74 of the Contract Act, for this simple reason that here no sum is named in the contract as the amount to be paid in case of a breach of the contract. What is specified in the contract is only the enhanced rate of interest, but no definite amount is specified as being payable in the event of a breach. Nor can it be said that the amount, though not expressly stated in definite terms, is an ascertainable and definite amount which would

(1) (1882) L.R. 21 Ch. Div. 243. (2) 9 C. 689. (3) 19 C. 392.
(4) 2 C.W.N. 234. (5) 2 C.W.N. 333. (6) 26 C. 300.

become payable at the date of the breach. If the provision had been that interest would be charged at the enhanced rate, not merely from the date of default in payment but from the date of the original loan, then it might be said that so far as the increased interest between the date of the loan and the date of default was concerned, that was a definitely ascertainable amount which became payable on the date of the breach of contract. But here there is no such provision : the increased rate of interest is claimable only from and after the date of default in payment.

[426] It was argued that in the case of *Kala Chand Kyal* v. *Shib Chunder Roy* (1) the interest at the enhanced rate accruing due subsequent to the date of default was held to come within the scope of s. 74 of the Contract Act, but that was only because it was considered by the majority of the Full Bench to be a part of the whole amount that became payable on the breach of the contract, the other part being interest at the enhanced rate that had become payable in regard to the period between the date of the loan and date of default. This is what Mr. Justice Pigot, whose judgment was concurred in by the majority of the Full Bench, said in his judgment : "Upon the second question I think that when the provision in the contract in question amounts to a provision for a penalty (or which is the same thing, stipulated for a sum in case of breach within the meaning of s. 74), that that goes to the whole sum which may accrue due under the provision, although it may be that by non-payment for an indefinite time the aggregate amount ultimately payable may greatly exceed the amount—the fixed ascertainable amount—to be due at time of default. I think they cannot be separated, and that s. 74 applies to all, that is, that it applies to the money claimed at the increased rate of interest from the date of the bond until realization." But the reason for the application of that principle, which consisted in a part at least of the amount claimable being already due and ascertainable at the date of the default, is wanting in this case, there being no provision that the enhanced interest is to be recoverable from any date anterior to the date of default.

In the two cases cited from 2 C.W.N. this distinction is expressly pointed out, and the learned Judges in those two cases held that they came within the scope of s. 74, because they were of opinion that under the terms of the contract they had before them, the increased rate was claimable, not merely from the date of default, but from the date of the loan.

Then, as to the second branch of the contention urged on behalf of the appellant, it is enough to say, that although it is in the power of the Court, if a proper case is made out, to refuse to enforce a clause in a contract quite independently of s. 74 [427] of the Contract Act, no such case has been made out. The parties to the contract were *sui juris*. The party seeking the benefit of the contract stood in no fiduciary relation to the other party, which would require the application to this case of considerations such as those that were applied by the Privy Council in the case of *Kamini Sundari Chaodhrani* v. *Kali Prosunno Ghose* (2). Nor can it be said that the terms of the contract here are in themselves so extortionate that the Court is bound to hold that it was an unconscionable bargain, and as such not enforceable.

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(1) 19 C. 392. (2) 12 C. 225.

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Both branches of the contention urged before us on behalf of the appellant therefore fail, and the appeal must be dismissed with costs.

HARINGTON, J.—I am of the same opinion. It appears to me that the parties have made an arrangement for the payment of the interest during the continuance of the mortgage which has been put into an alternative form. The mortgagee may, if he likes, either pay Rs. 20 a year during the time the mortgage is subsisting, or he may pay ½ anna a rupee a month on the principal and interest, these payments all coming to an end, when the time arrives for the repayment of the money borrowed under the mortgage-deed. The parties have chosen to make an alternative stipulation as to the payment of the interest on the mortgage; that, it seems to me, they were quite entitled to do, and it is impossible to say that the second stipulation involving the payment of interest at a different rate from that provided by the first stipulation is "a sum named in the contract to be paid in the case of a breach" as provided in s. 74. If that is so, I am also of opinion that this appeal fails.

S. C. G. *Appeal dismissed.*

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27 C. 428 = 4 C.W.N. 169.

[428] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson and Mr. Justice Hill.

NUNDO LAL BOSE (*Appellant*) *v.* NISTARINI DASSI (*Respondent*).*
[19th, 20th and 21st December, 1899 and 10th January, 1900.]

Suit—Compromise, of matters in suit, of matters outside scope of suits—Authority of Counsel to make such compromise—General authority—Special authority—Notice—Evidence, statement of Counsel, not made on oath, if objected to.

Counsel possesses a general authority, an apparent authority, which must be taken to continue until notice be given to the other side by the client, that it has been determined, to settle and compromise the suit in which he is actually retained as Counsel. Where the compromise, however, extends to collateral matters, to matters quite outside the scope of the particular case in which Counsel is engaged, in order to bind his cilent it must be shown that he had from his client special authority to compromise, upon the terms upon which the compromise was effected, and the other side cannot avail themselves of the position that they did not know that it had not been given; they are not entitled to assume, as in the case of an apparent authority, that it was given and was existing.

Where Counsel under a misapprehension of his client's instructions and believing himself to have authority acts in fact without it, he cannot bind his client.

Though it has been the practice in Courts in England to accept the statements of Counsel made from his place at the Bar, the Court entertained great doubt whether, if that course be objected to by the opposite side, the party putting forward such statement could insist upon its being made without the sanctity of an oath.

[R., 17 C.W.N. 156 = 15 Ind. Cas. 156 (158); 15 C.P.L.R. 73 (76); U.B.R. (1897—1901), 527; 41 C. 406 (412) = 18 C.L.J. 582 = 18 C.W.N. 147 = 14 Cr. L.J. 485 = 20 Ind. Cas. 741; 40 C. 898 = 23 Ind. Cas. 25 (60) = 18 C.W.N. 185; 18 C.W.N. 1323.]

This was a suit instituted by one Srimati Nistarini Dassi as the widow and heiress of one Rai Mohendra Nath Bose against Rai Nundo Lal Bose and Rai Pasupati Nath Bose his brothers in their personal

* Appeal from a decision of Stanley, J., sitting in Original Civil Jurisdiction, dated 14th June 1899 (1).

(1) 26 C. 891.

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character, and also as executors of the last will and testament of her husband and against one Srimati Kadumbini Dassi, a Hindu widow, and the object of the suit was to have a certain trust deed of which the said Kadumbini Dassi was the surviving trustee, dated the 24th May 1877, an award, dated the 16th July 1889, and a certain decree, dated the 29th August 1889 declared fraudulent and void as against her, and in no way binding upon the plaintiff, and to have the will of the said Rai Mohendro [429] Nath Bose construed, and the rights of all parties thereunder ascertained and declared, for the administration of his estate, and for certain consequential relief. The defendant Kadumbini Dassi did not appear in this suit, but the other defendants put in written statements, and the case came on for hearing in due course before Mr. Justice Stanley, and after a hearing which occupied many days, suggestions for a compromise of this and of other litigation between the parties were made. After certain negotiations between the parties the terms of an alleged compromise were put in before Mr. Justice Stanley, who, on the 29th of June 1899, made a decree in terms of the compromise so alleged to have been entered into. Subsequently however, and before the decree was drawn up, Nundo Lal Bose applied on notice to the parties before Mr. Justice Stanley for an order to stay the drawing up of the so-called compromise decree and to have the alleged compromise set aside and the suit retried, on the grounds that though there were negotiations for a compromise, he had never authorized his Counsel to agree to the compromise alleged, that his Counsel had no such authority and that the compromise was not effective as against him. Although the defendant Kadumbini Dassi did not appear to the suit or upon the hearing before Mr. Justice Stanley she was served with notice of the application, and upon the application coming on for hearing Mr. Justice Stanley refused to hear her by her Counsel, on the ground that, as she had not previously appeared in the suit, she was not entitled to be heard. During the hearing of the application Mr. Mitter, who had consented to the compromise on behalf of the defendant Nundo Lal Bose, at the request of the Court, made an unsworn statement from his place at the Bar, as to what had happened with regard to the compromise. This course was objected to by Counsel who appeared on the application on behalf of Nundo Lal Bose, and the case of *Wilding* v. *Sanderson* (1) was cited in support of his objection.

The application was refused with costs.

From this decision the defendant Nundo Lal Bose, appealed.

Sir *Charles Paul*, Messrs. *Pugh* and *A. Chowdhuri*, for the appellant.

[430] Mr. *J. T. Woodroffe* (*Officiating Advocate-General*), Messrs. *Dunne* and *J. G. Woodroffe*, for the respondent Nistarini Dassi.

Sir *Griffith Evans*, Messrs. *Allen* and *Garth*, for the respondent Pasupati Nath Bose.

Mr. *Hyde*, for the respondent Kadumbini Dassi.

DEC. 19TH, 20TH AND 21ST. Sir *Charles Paul.*—Counsel has authority to compromise a suit in which he is acting unless he is forbidden to do so expressly by his client. If he compromises a matter outside the suit he must get special authority to do so from his client with regard to that particular matter. This is admitted by the other side. It will be for this Court to find on the evidence whether or not Counsel had authority to compromise in this case.

(1) (1897) 2 Ch. Div. 534.

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Mr. Mitter's statement is not admissible in evidence under the rules of evidence in India, the statements made in our affidavits must be rebutted by statements which are admissible in evidence. The Indian Evidence Act has repealed all rules of evidence not contained in any statute or regulation in force, see s. 2 of the Evidence Act; and the other side must, therefore, show that Mr. Mitter's statement is admissible under the Evidence Act. *Rani Lekraj Kuar* v. *Mahpal Singh* (1); as to the English law on the point the former practice is laid down in *Rickman* v. *Bernes* (2). In a lator case of *Wilding* v. *Sanderson* (3) Counsel made their statement on oath and were cross-examined, that was the course which ought to have been adopted in this case, especially as we insisted upon it in the Court below.

[MACLEAN, C. J.—Assuming that the decree ought not to have put an end to the *debuttar*, if you did give your consent, does it lie in your mouth now to say that it should not have been set aside ?]

Sir *Charles Paul*—Yes. In *Hara Sundari Debi* v. *Kumar Dukhinessur Malia* (4) where a petition of compromise was filed one of the parties to it was subsequently allowed to come in and say that effect should not be given to it, and that the suit should proceed.

[431] Here also the plaintiff was aware that we objected to the compromise before the decree was drawn up, and therefore the compromise under the circumstances ought to have been set aside. As a matter of fact the decree has not yet been drawn up. *Carrison* v. *Rodrigues* (5). This decree deals with matters beyond the scope of this suit, and the Court cannot make such a decree, see s. 375 of the Civil Procedure Code. All that the Court can do is to leave the matter as a compromise between the parties, and then we could resist any suit that might be brought against us for specific performance.

Mr. *Chaudhuri following.*—Mr. Mitter's statement is not admissible in evidence. The Courts in this country should be guided by the Evidence Act alone. *Balkishen Das* v. *Legge* (6).

I submit the lower Court ought to have taken into consideration the statements sworn to in our affidavits add not to have decided the case only on Mr. Mitter's statement.

Mr. Mitter was retained in this case only; he consented to a compromise which effected other suits in which he was not retained. There was, therefore, no implied authority in him to consent to this compromise, and it was for the other side to ascertain that he had express authority or not.

Mr. *Hyde*. I submit I am entitled to be heard on this appeal.

Mr. *Woodroffe.*—I object to Mr. Hyde being heard. His client did not appear at the hearing of the suit, and the suit was withdrawn as against her ; she is not affected in any way by the compromise.

Mr. *Hyde.*—It is true my client did not appear at the hearing of the suit. It was not necessary for her to do so, she could trust to the Court to look after her interest. As trustee I should have been served with notice of the compromise, which deals with the deed of trust. I was served with notice of motion and appeared in the Court below, but was not allowed to be heard. I have also been made a respondent in this appeal. The suit ought not to have been withdrawn as against me. I was a necessary party to it.

(1) 7 I A. 63 (70).
(2) (1895) 2 Ch. Div. 638.
(3) (1897) 2 Ch. Div. 534 (539).
(4) 11 C. 250.
(5) 13 C. 115.
(6) 22 A. 149.

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[432] [Maclean, C. J.—I think we ought to hear Mr. Hyde.]

Mr. *Hyde* then urged his objections to the compromise.

Mr. *Woodroffe contra.*—With regard to the objection raised by the other side that Mr. Mitter's statement is not admissible in evidence, I submit that it is evidence and admissible as such, though it may not be evidence as defined by s. 3 of the Evidence Act. There is no provision of the Code which says that the Court is to decide only upon evidence as defined in the Evidence Act. Section 165 of the Evidence Act says that the judgment must be based upon facts which are relevant and "duly proved." A fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought to act upon the supposition that it exists, see s. 3 of the Evidence Act. Matters fall within the definition of "proved" in s. 3, which are not proved by evidence as defined in that Act. So long as a judgment is based on relevant facts clearly proved, though not necessarily on evidence as defined in the Act, it cannot be set aside. In *Joy Coomar* v. *Bundhoo Lall* (1), where a Munsif in a suit respecting boundaries visited the locality, and in his judgment relied upon certain facts which had come under his observation during his visit, and which were not proved by any evidence, it was held that though the result of the inquiry was not evidence according to the definition in the Evidence Act, it was a matter before the Court, which might have been taken into consideration.

It has been held that a statement of a Judge is incontrovertible though not on oath—*Regina* v. *Pestanji* (2); that is not evidence according to the Act, but it is as much admissible in evidence as the statement of a Counsel. There is a sanction in the case of a barrister making a statement though not that of an oath. An oath is not the only sanction. For instance, a dying declaration may not have the sanction of an oath yet it is invariably acted upon and has been made admissible as being a relevant fact which may be proved—see s. 32 of the Evidence Act—though it does not come within the definition of evidence as given in the Act.

[433] In the case of *Moonshee Ameer Ali* v. *Maharnee Inderjeet Singh* (3) Counsel for the appellant before the High Court gave an undertaking that no appeal to the Privy Council should be made from a decree of the High Court; notwithstanding such undertaking an appeal was filed before the Privy Council, the High Court then called upon Sir Charles Paul, who was the Counsel for the appellant, to make a statement from his place at the Bar, and not upon oath as to what had transpired in Court at the trial, as to the undertaking. The Judges then certified as to what Sir Charles stated in Court, and that certificate was acted upon by the Privy Council; that was not strict evidence. All these facts do not appear in the report, but Sir Charles will bear me out.

Sir *Charles Paul.*—That was so, my Lords.

Mr. *Woodroffe.*—In *Aitken* v. *Bachelor* (4) it was held that indorsements made by Counsel on both sides on their briefs and bearing their signatures were evidence of a submission to arbitration.

Mr. Pugh did not object to Mr. Mitter's statement, but merely suggested that the practice in *Wilding* v. *Sanderson* (5) should be followed; he

(1) 9 C. 363. (2) 10 B.H.C. 75. (3) 14 M.I.A. 203.
(4) (1893) 62 L.J.Q.B.N.S. 193. (5) (1897) 2 Ch. Div. 534 (539).

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never pressed his objection, but suggested that Mr. Chackravarty, Mr. Mitter's junior, should also be asked to make a statement.

Mr. *Pugh.*—I objected to Mr. Mitter's statement and asked the Court to follow the procedure in *Wilding* v. *Sanderson* (1), and that Mr. Mitter should be put upon his oath, if his statement was required.

Mr. *Woodroffe.*—In the case of *Kempshall* v. *Holland* (2) on Counsel in the case being asked if he were willing to make a statement as to what had happened with regard to a compromise of that case Counsel stated that he had written out a statement and had also put it in the form of an affidavit in case [434] the Court required an affidavit. Lord Esher said that the Court would never admit an affidavit in these cases, but trusted to the honor of Counsel; the statement was then read. That procedure was approved of and followed in the case of *Hickman* v. *Berens* (3). That procedure was followed by the lower Court in this case and, as I submit, rightly followed.

[MACLEAN, C. J.—If the other side object to Counsel's statement not being on oath, is Counsel in any better position than an ordinary witness? Could the Judge accept his statement without putting him on his oath]?

Mr. *Woodroffe.*—I submit he can, there was in truth no objection taken in this case. I say it was a suggestion and not an objection made by Mr. Pugh, as he asked the Court to invite Mr. Chackravarti to make a statement. Mr. Jackson and Mr. Bonnerjee also made statements, and the Court has acted on those statements.

Counsel have authority to settle with regard to all matters in suit, unless there is express prohibition, and that prohibition has been communicated to the other side. The Judge here has found that we had no notice that Nundo Lal had resiled from his agreement. *Matthews* v. *Munster* (4) and *Lewis* v. *Lewis* (5).

The Evidence Act contains no provision for putting the witnesses on oath. If Stanley, J., was wrong in not putting Mr. Mitter on oath the Court by the Oaths Act is enabled to get rid of that defect. The word "omission" in the Oaths Act includes intentional omission. Section 13, Act X of 1873. See *Queen* v. *Sewa Bhogta* (6).

Sir *Griffith Evans* following.—The Evidence Act does not affect this matter. It does not deal with the question of the swearing of witnesses —that is left to the Oaths Act. The whole of the procedure with regard to this has been left out of the Evidence Act, which gives a special definition of what is evidence; it excludes *inter alia* matters judicially noticed. Section 5 of the Oaths Act is the only section which gives a definition of who are witnesses, [435] but there is no provision in it that every person, who makes a statement, is to be sworn or affirmed; so a statement not on oath may be evidence, though the person making the statement is not a witness as defined in that section.

Section 118 of the Evidence Act provides as to who may testify, but does not provide for any sanction for speaking the truth under which they are to testify. Section 14 of the Oaths Act brings a person making a false statement within the Penal Code, whether that statement is in solemn affirmation or not. Affirmation is merely a ceremony—it is merely reminding a man that he must speak the truth, otherwise he will be punished. If Stanley, J., was wrong in admitting Mr. Mitter's statement

(1) (1897) 2 Ch. Div. 534, (539).
(2) (1895) 14 R 336 C.A.
(3) (1895) 2 Ch. Div. 638.
(4) (1887) L.R.20 Q. B. D. 141.
(5) (1890) L.R. 45 Ch. Div. 281.
(6) 14 B. L.R. 295.

without his being sworn, that omission is covered by the Full Bench ruling in *Queen* v. *Sewa Bhogta* (1), see also *Emp.* v. *Viraperumal* (2), *Emp.* v. *Shava* (3), *Queen* v. *Mussamut Itwarya* (4).

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This matter could be put beyond a doubt by asking Mr. Mitter to make an affidavit under s. 568 of the Code of Civil Procedure.

With regard to the compromise, an express authority to Mr. Mitter is necessary under the circumstances of this case involving, as it does, matters outside the scope of the suit. I say that express authority was given him by Nundo Lal.

Mr. *Chaudhuri* in reply.

Cur. adv. vult.

JUDGMENT.

JANY. 10TH. The following judgment was delivered by MACLEAN, C. J.—This is a suit instituted by one Srimati Nistarini Dassi as the widow and heiress of one Rai Mohendra Nath Bose against Rai Nunda Lal Bose, Rai Pasupati Nath Bose his brothers, in their personal character, and also as executors of the last Will and Testament of her husband, the said late Rai Mohendra Nath Bose, and against one Srimati Kadumbini Dassi, a Hindu widow; and the object of the suit is to have a certain Trust Deed, of which the said Kadumbini Dassi was the surviving trustee, and dated the 24th of May 1877, an award dated the 16th [436] of July 1889, and a certain decree, dated the 29th of August 1889, declared fraudulent and void as against her and in no way binding upon the plaintiff, and to have the Will of the said Rai Mohendra Nath Bose construed and the rights of all parties thereunder ascertained and declared, for the administration of his estate, and for certain consequential relief.

The defendant Kadumbini Dassi did not appear in this suit, but the other defendants put in written statements, and the case came on for hearing in due course before Mr. Justice Stanley, and after a hearing, which occupied many days, suggestions for a compromise of this and of other litigation between the parties were made.

It is alleged for the respondents in the present appeal, namely, the plaintiff, and the defendant, Pasupati Nath Bose, that after certain negotiations a compromise of this suit and the other suits, to which I have referred, was effected, that the defendant Nundo Lal Bose expressly authorized his counsel to consent to this compromise on his behalf, that the terms of the compromise came before Mr. Justice Stanley, and that he made a decree in terms of the compromise so alleged to have been entered into.

Nundo Lal Bose, the present appellant, however, contends that though admittedly there were negotiations for a compromise, he never authorized his Counsel to agree to the compromise alleged, that his Counsel had no such authority, and that the compromise was not effective as against him. Holding that view, he, on the 15th of July 1899, gave the notice of motion, which will be found set out at p. 1 of the paper book which in effect was one asking the Court to stay the drawing up of the so-called compromise decree, and to have the alleged compromise set aside.

Although the defendant Kadumbini Dassi did not, as I said before, appear to the suit or upon the hearing before Mr. Justice Stanley she was served with the notice of motion, and upon that motion coming on for hearing, Mr. Justice Stanley refused to hear her by her Counsel, on the

(1) 14 B.L.R. 294.
(2) 16 M. 105 (110, 116).
(3) 16 B. 359.
(4) 14 B.L.R. 54.

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ground that as she had not previously appeared in the suit, she was not entitled to be heard on the motion.

The motion was supported by two affidavits of Nundo Lal Bose himself with certain documents exhibited to those affidavits and [437] by the affidavit of Hirendra Nath Dutta, the solicitor of Nundo Lal Bose, of one Benode Behary Bose, the son of Nundo Lal Bose, and of one Nilratan Sen, who appears to have been a friend of the defendant Nundo Lal Bose, and to have been present at some of the interviews to which I shall refer in a moment, as also a joint-affidavit in reply by Hirendra Nath Dutta and Nundo Lal Bose.

The respondents supported their case by an affidavit of Romesh Chunder Bose, the attorney of the plaintiff, of one Monmotho Nath Singha, a brother of the plaintiff, of the said Pasupati Nath Bose, and of his solicitor Gonesh Chunder Chunder, and by a statement made from his place at the Bar by Mr. R. Mitter, a member of the Bar and an advocate of this Court, and who was at the time leading Counsel for Nundo Lal Bose.

The matter was heard before Mr. Justice Stanley on three or four days during the month of last July, and, in the result, Mr. Justice Stanley dismissed the application with costs, and Nundo Lal Bose has appealed to this Court.

His principal ground of appeal is that he never gave Mr. Mitter any authority to settle litigation, involving not only this suit but some other four or five suits, upon the terms of the alleged compromise. He further challenges the decree made on the ground that the learned Judge in the Court below ought not to have accepted the unsworn statement of Mr. Mitter when objection was taken by the appellant's Counsel that Mr. Mitter ought to have been sworn, that the decree was made in the absence of Kadumbini Dassi who was a party, and a necessary party to the suit, and that the decree determines certain trusts and provisions relating to a portion of the property in dispute, which under the award and decree of 29th August 1889 was declared to be *Debuttar*, and that it was not competent to the Court with the consent only of some of the parties interested, to set aside the decree of the 29th August 1889, which was a decree of a competent Court, and in the absence of those members of the family who were, or who might be interested in maintaining the *Debuttar* character of such property.

On the present appeal, we have allowed the respondent, Kadumbini Dassi, to be heard by her Counsel, and to put in an [438] affidavit, which she desired to put in in the lower Court, but which she was unable to put in by reason of the ruling of the learned Judge that he could not hear her. In our opinion, as she was a party to the suit and had been served with notice of the application to set aside the compromise decree, she was entitled to be heard.

It must be obvious, from what I have said, that if we are of opinion upon the evidence—for it is a question of fact—that the present appellant did not authorize his Counsel Mr. Mitter, to consent to this compromise, the compromise decree cannot stand, and equally obvious that the other questions, except that, as to the admissibility of Mr. Mitter's statement, would become of no practical importance; and the stress of the argument adduced on behalf of the respondent's Counsel has been to show that such authority was, in fact, given by Nundo Lal Bose to Mr. Mitter.

There cannot, I think, be any reasonable doubt at the present day that Counsel possesses a general authority,—an apparent authority, which

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must be taken to continue until notice be given to the other side by the client that it has been determined—to settle and compromise the suit in which he is actually retained as counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained. Here, however, the compromise extended to collateral matters, matters quite outside the scope of the particular case in which Mr. Mitter was retained as counsel, and, in order to bind the client, it must be shown that Mr. Mitter had, from his client, a special authority to compromise, and compromise upon the definite terms which are set up by the present respondents. This proposition was not disputed in the lower Court, nor has it been contended for before us. As to the authority of counsel to compromise on behalf of his client, I may refer to the cases of *Strauss* v. *Francis* (1); *Swinfen* v. *Swinfen* (2); and *Matthews* v. *Munster* (3).

There are other authorities, but I need not refer to them as the proposition of law is not questioned.

[439] Before I deal with the facts of the case, I must say a word or two as to whether or not the statement of Mr. Mitter, not being on oath, was admissible in evidence. So far as my personal experience goes, it has been the undoubted practice in the Courts in England to accept the statement of counsel in matters of this nature, statements made from their place at the bar. I am not prepared, however, to go so far as to say that if that course be objected to by the opposite side, the party putting forward such statement could insist upon its being made without the sanctity of an oath. In the recent case of *Wilding* v. *Sanderson* (4) it was thought prudent, as there was some doubt upon the point, to have the learned counsel sworn, as they were, and they gave their evidence from their places at the bar. That course was not adopted in the case of *Hickman* v. *Berens* (5), but there is nothing in that case to indicate that any objection was raised. I entertain great doubt whether, if there be any such objection, the other side can insist upon the statement being accepted, unless upon oath, and in making this observation, I am not unmindful of what Lord Esher is stated to have said—for we have not Lord Esher's own words—that he would never admit an affidavit in such cases. I should have thought, however, that as a matter of substance, the matter was not of much practical importance, for I can scarcely suppose that any counsel, if he understood that the other side were not prepared to accept his statement made upon his word of honour, would not himself ask that he might be allowed to give his evidence in the usual way. I need not discuss this matter further, for we should not have been disposed to allow the appeal on this ground, but if necessary would have given the respondent the opportunity of putting in an affidavit by Mr. Mitter, saying that his statement before the Court below was a true one. In this view it becomes unnecessary to discuss whether, as the Advocate-General urged, the statement was admissible, not only under the Indian Evidence Act, but as a statement made by a *quasi* officer of the Court to whose word some sort of special sanctity must be taken to attach, a proposition which, before its acceptance, would require much consideration; or **[440]** to deal with the argument of Sir Griffith Evans that having

(1) (1866) L.R. 1 Q.B. 379.
(2) (1857) 1 C.B.N.S. 364 = 2 De. Gex. and Jones, 381.
(3) (1887) L. R. 20 Q. B. Div. 141.
(4) (1897) 2 Ch. Div. 534.
(5) (1895) 2 Ch. Div. 638 (640).

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regard to s. 13 of the Oaths Act, it made no difference whether the statement was or was not upon oath, a proposition which is at once novel and startling, and which, if well founded, must apply to the case of every witness, and possibly to every Juryman.

I will now proceed to deal with the facts of the case, and, I think I am doing no injustice to the judgment of the learned Judge in the Court below when I say that it appears to be almost entirely based upon the statement of Mr. Mitter, which the learned Judge regards as clear, cogent and convincing. Save a quite passing reference to the evidence of Benode Behary Bose and Hirendra Nath Dutta I can find no reference to any of the affidavits on either side, nor can I discover any analysis of the statement made by Mr. Mitter himself. This, to my mind, is a case in which the evidence ought to be scrutinized with very careful attention.

I will now deal with Mr. Mitter's statement with the view of ascertaining and determining whether, if there were nothing but that statement in the way of evidence in the case, the respondents have satisfactorily made out that the appellant Nundo Lal did give an express or special, authority to his counsel to consent to the terms of the compromise.

It is not necessary to go back further than Monday, the 26th June, when it was mentioned to the Court that negotiations for settlement were proceeding, and the case was adjourned. It is clear from Mr. Mitter's own statement that at the consultation, which took place between Nundo Lal Bose and his counsel, on Monday, Nundo Lal's offer was to pay Rs. 60,000 to the plaintiff as a lump sum to be paid by instalments, and that on that occasion Nundo Lal Bose never agreed to pay any of the plaintiff's costs, but was willing to pay a lump sum to cover every thing. There were several other points discussed at that interview, but to cite Mr. Mitter's own words, our offer was that "each party was to pay their costs." It will be seen from this, that from the very outset the appellant objected to paying the plaintiff's costs of the suit, which admittedly amounted to a very large sum. According to Mr. Mitter he handed over the terms to Mr. Bonnerjee, who was the plaintiff's leading counsel, the same day [441] (Monday), and Mr. Bonnerjee said that his client would not take the Rs. 60,000, but she must have the costs as between party and party. It is obvious that from the very first, one of the main, if not the main points in dispute was the payment of the plaintiff's costs of the suit.

On Tuesday morning, the 27th, the case again stood over, and ultimately on that day Mr. Bonnerjee put down his terms in writing; and those terms were given to Mr. Mitter.

I may here interpose that according to the evidence of Babu Gonesh Chunder Chunder who was the attorney for Pasupati Nath Bose (see paragraph 14 of his affidavit) Mr. Mitter, Mr. Bonnerjee and himself had on Tuesday a discussion as to the terms of the proposed compromise, and it was arranged that Mr. Mitter should see the defendant Nundo Lal Bose and try to induce him to accept the plaintiff's term of payment to her of Rs. 40,000, and her party and party costs of the suit, and that Mr. Mitter left that interview in order to see Nundo Lal Bose, that he came back to the Bar Library after a short time, and told Mr. Bonnerjee and Babu Gonesh Chunder Chunder that he had succeeded in inducing Nundo Lal Bose to accept the above last mentioned terms, and that thereupon Mr. Bonnerjee put the terms into writing and wrote out the exhibit marked A. Mr. Mitter does not say a word about all this. It is, therefore,

reasonably clear that the memory either of Mr. Mitter or of Babu Gonesh Chunder Chunder, must be defective upon this point.

However be that as it may, Mr. Mitter saw Nundo Lal at about 1 o'clock in Mr. Chakravarti's Chambers, and there were present at that interview besides the two counsel Mr. Mitter and Mr. Chakravarti, Nundo Lal, his two sons, his attorney, Babu Hirendranath Dutta and his friend one Nilratan Sen.

I may, perhaps, mention that when this motion was being heard before Mr. Justice Stanley, counsel for Nundo Lal asked that Mr. Chakravarti should be asked to state his recollection of what passed, but the learned Judge in the Court below declined to allow that course to be pursued.

On the occasion of this interview on Tuesday Mr. Mitter went through with the present appellant all the terms [442] suggested by Mr. Bonnerjee and wrote down his objections, and I will take it for the moment that the paper Ex. B. did indicate all the objections which Nundo Lal had to Mr. Bonnerjee's terms.

It is perfectly clear that at that interview Nundo Lal was unwilling to pay the costs of the suit as between party and party. Mr. Mitter says so, and he also says that the only two points as to which there was any difference were the party and party costs of the suit and the costs of suit No. 68. However he sums up the result of these interviews by saying that both he and Mr. Chakravarti were perfectly certain that the only thing that stood in the way of a settlement was the plaintiff's claim to a separate house worth Rs. 10,000, or the value thereof. I confess feeling some difficulty as to how Mr. Mitter could have arrived at this conclusion, in the face of his own memorandum in writing which indicates that there were other points in dispute still open.

Mr. Mitter then went back to Mr. Bonnerjee, and Mr. Bonnerjee on behalf of his client refused to accept the terms as proposed by Mr. Mitter.

There then for the moment was an end of the matter in the sense that the negotiating parties were not at one, and that there was then no concluded agreement of compromise.

The only express or special authority, which Mr. Mitter then had to compromise on behalf of his client Nundo Lal Bose, was thus at an end, as Mr. Bonnerjee would not accept the terms proposed by Nundo Lal Bose through his counsel Mr. Mitter. I am taking it that looking at Ex. B. the words as to all parties paying their own costs applied only to suit No. 68 of 1898. That suggestion was, however, met by a direct negative from Mr. Bonnerjee, but I am not unmindful that Mr. Mitter says that he understood Nundo Lal to say that that was not to stand in the way of a settlement.

On Tuesday then no agreement binding on either party had been arrived at. On Wednesday, the 20th, it was stated to the Court that the parties had been unable to come to terms, and the case was again adjourned in the hope of an amicable settlement. Mr. Mitter stated that there was only one very small item, which had not been settled, but, if the evidence filed on behalf of the [443] appellant be trustworthy, Mr. Mitter must have known on the Tuesday afternoon, that even if in his interview with Mr. Mitter on the Tuesday Nundo Lal Bose had agreed to pay the plaintiff's costs of this suit he had resiled from that position later on in the same day. It is quite clear on Mr. Mitter's own showing that Nundo Lal never agreed to contribute anything towards finding a residence for the plaintiff, and it is equally clear that on the evening of the Wednesday

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Mr. Mitter was expressly told that Nundo Lal was not willing to pay the plaintiff her party and party costs. On the Wednesday then the whole matter was open, for the terms offered by Nundo Lal through Mr. Mitter had not been accepted; that this was so is clear from Mr. Bonnerjee's statement on the Thursday morning to the Court: "I am sorry to say we have been unable to settle and the case must proceed," and the case did proceed.

By the Thursday morning then there was no agreement of settlement, and it is important to see what took place on that day in the way of express authority being given to Mr. Mitter to compromise on his client's behalf. After the midday adjournment on that day Mr. Mitter mentioned to the Court that the case had been settled, the only obstacle in the way of settlement having been removed. I will quote what he says: "I was also informed by Hirendra Nath Dutta that Gonesh Chunder and Pasupati had gone to see Nundo Lal on the subject, and before the mid-day adjournment I was informed that Pasupati had consented either to buy a house worth Rs. 10,000 or to pay the Rs. 10,000 himself. The only obstacle in the way of settlement being removed your Lordship will remember that Mr. Woodroffe was putting in some Bengali accounts, which had not been translated, I said that Mr. Woodroffe would undertake to translate them, if necessary, because I had then been informed that the only obstacle had been removed, and after the midday adjournment I mentioned to the Court that the case had been settled. Hirendra Nath Dutta was present in Court at that time and also Binode, and the other son of Nundo Lal and also Babu Romanath Ghose and several others. Then the terms were fair copied in Court by Mr. Shelley Bonnerjee, and whilst being copied, I was told by Hirendra Nath Dutta that Nundo Lall [444] wanted to see the terms. I told him that the terms were the same as agreed to by him on Tuesday last. The only difference was that the plaintiff's maintenance, instead of being a charge upon moffusil properties, had been charged upon the dwelling houses of Nundo Lal and Pasupati. Hirendra Babu said that Nundo Lal was particularly anxious to see the terms."

I feel some difficulty in understanding how Mr. Mitter could have thought, and told the Court that the only obstacle in the way of a settlement had been removed, when on the previous evening he had been expressly told that Nundo Lal was unwilling to pay the plaintiff's costs, or what authority he had to agree to the terms of the previous Tuesday as in the interval, Nundo Lal had told him that he would not pay the party and party costs of the plaintiff.

I can only suppose that this important point has escaped his memory. Taking Mr. Mitter's statement most favourably to the plaintiff, the only special authority which Nundo Lal gave Mr. Mitter was to agree to Mr. Bonnerjee's terms in Ex. A., as modified by Ex. B., and when those modifications were rejected by Mr. Bonnerjee it seems to me that Mr. Mitter's special authority was determined, and that in order to bind Nundo Lal, as to any fresh terms, a further special authority would be requisite.

We now come to the interviews of the 29th between Mr. Mitter and Nundo Lal at which the solicitor Hirendra Nath Dutta, Nundo Lal's son, Romanath Ghose, and one Nil Ratan Sen were present. Mr. Justice Stanley would appear to regard this as the only important part of the statement; I am unfortunately unable to share that view, for, to my mind, it is extremely important to ascertain what preceded that interview.

It is quite clear that at that interview Nundo Lal objected to pay the party and party costs of the plaintiff or her costs of suit No. 68. He commenced the conversation in that way.

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It is clear that he was determined not to pay those costs, for he had told Babu Gonesh Chunder Chunder only an hour or so before that he would not pay the plaintiff's costs. Seeing Nundo Lal in that state of mind, his solicitor very properly suggested to the counsel that he should get the terms signed by Nundo Lal, when Mr. Mitter said that he would not insult Nundo Lal **[445]** by asking him to put his signature to the paper. The suggestion of the solicitor is, to my mind, very significant, by indicating that he at any rate was under the impression that there was at least great doubt whether Nundo Lal was agreeing to the terms. Nundo Lal said nothing more. He only smiled and Mr. Mitter told him, "I am going back to Court and these terms will be put in," and he also told him that he was going to consent on his behalf, to which Nundo Lal said nothing, and so the interview came to an end.

If this were all the evidence in the case I should entertain a very grave doubt whether, having regard to the fact that Nundo Lal had at the very outset of the interview of 29th said that he would not pay the party and party costs of the plaintiff in this suit, but only a specified sum, and would not pay the costs of suit No. 68, we should be justified in holding that under the circumstances narrated by Mr. Mitter, the latter was justified in consenting to the minutes, or that we should be justified in saying that Nundo Lal gave him express authority to consent to these terms. I do not think we should be warranted under all the circumstances in inferring from the smile and the subsequent silence of Nundo Lal Bose, a tacit acquiescence on his part to the terms proposed, or as giving any authority to Mr. Mitter to consent on his behalf.

It is significant that according to Mr. Mitter's own statement the solicitor. Hirendra Nath Dutta followed him into Court and told him that he had no instruction from him to consent to this compromise.

I have hitherto dealt with the case entirely upon the statement of Mr. Mitter, but there is a great deal of evidence in the matter to which the learned Judge in the Court below has given no attention. We have the affidavits filed on behalf of the appellant, and, if the story of these witnesses is to be believed and none of them have been cross-examined, Nundo Lal Bose never did agree to the terms of this compromise or authorized his counsel to agree to them. As regards Nundo Lal's affidavits I will only deal with those portions of them in which he speaks from his own personal knowledge. He tells us in paragraphs 18 to 20 of his affidavit, the terms upon which he was prepared **[446]** to settle the matter at his interview with Mr. Mitter on Tuesday, the 27th. It is to my mind reasonably clear that, whilst he did not object to pay Rs. 20,000 towards the plaintiff's costs of this suit, which sum was subsequently raised to Rs. 25,000, he did object to an unlimited liability in respect of those costs, and he tells us that at this interview he did not give Mr. Mitter authority to settle the suit on his behalf. He tells us that at the interview at which he was present at his attorney's office at about half-past 12 on the 29th (the Thursday) he absolutely declined to settle the suit unless the costs of the plaintiff in the suit were limited to Rs. 20,000 and in this he is substantially corroborated by Gonesh Chunder Chunder himself who says that Nundo Lal said "I won't pay any costs of the plaintiff, why should I pay any costs to her and settle this suit." This is extremely

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probable as he had learnt that the costs would be very heavy, certainly exceeding 25,000 rupees.

And, now I come to what he says as to the interview between Mr. Mitter and himself on Thursday, the 29th, and his account of that interview will be found at paragraphs 43, 48 and 49 of his affidavit. I may perhaps here interpose the observation that Mr. Mitter, at the moment that he left the Court to see Nundo Lal on the Thursday, could scarcely have thought that he had any sufficient authority from him to consent to the proposed compromise, for, if so, he would not have thought it necessary to go outside the precincts of the Court to the office of the attorney who was instructing him to interview his lay client. It is clear that at this interview the defendant Nundo Lal went through the proposed terms and put marks in blue pencil against those terms to which he objected, one of which admittedly was as to the payment of the party and party costs and the costs of suit No. 68. If Nundo Lal is to be believed he pointed out other objections as well. It is, however, very unfortunate that this document is not forthcoming; its disappearance is not, I think, satisfactorily accounted for. Nundo Lall says he never authorized Mr. Mitter to accept the terms of the compromise, or to compromise or settle the suit on those terms, and it will be observed that Mr. Mitter himself does not go so far as to say that he had authorized him, but only that he honestly believed that Nundo Lall had accepted the terms. I am not desirous of making or suggesting any imputation upon Mr. [447] Mitter in the matter: I am prepared to accept, to the fullest extent, his statement as to the honesty of his belief that Nundo Lal had authorized him to act as he did; for I should be sorry to think that any member of the bar could act as Mr. Mitter has done, unless he were under such a belief. But the question of such an honest belief in the mind of counsel is one thing, whilst the question of whether special authority to settle were actually given by the client is quite another. As to this interview between Mr. Mitter and Nundo Lal Bose, the latter's account of it is corroborated by his solicitor Hirendra Nath Dutta, his son Benode Behary Bose, and Nilrattan Sen, as to which evidence the learned Judge in the Court below has been altogether silent. It would appear from the evidence of Hirendra Nath Dutta that at the interview which took place between Mr. Mitter and Nundo Lal on Tuesday, when Mr. Bonnerjee's written terms were discussed, an assurance was given to Nundo Lal that the plaintiff's costs of the present suit would not exceed Rs. 20,000, and according to his statement the consent of Nundo Lal to pay those costs was conditional upon the other terms upon which he insisted being complied with, and that afterwards when Nundo Lal learnt from his solicitor that the costs of the suit would, in all probability, exceed Rs. 20,000, he instructed his solicitor to go to Mr. Mitter and tell him that he would not pay those costs, unless they were limited to that amount, and the solicitor says he went and told Mr. Mitter so, and if this story be true, and it is not an improbable one, Mr. Mitter knew on the Tuesday, through his own professional client, that Nundo Lal Bose would not pay the party and party costs of the plaintiff of the suit, unless they were limited to Rs. 20,000. Anyway he knew on the Wednesday evening.

Nundo Lal Bose's story is corroborated in important particulars by the evidence of the witnesses he has called, and coupling that evidence with Mr. Mitter's own statement, I think it clear that Nundo Lal Bose was throughout determined not to pay these costs, if they exceeded Rs. 20,000 or Rs. 25,000.

I must now say a word or two as to what occurred after the interview on the Thursday. After some conversation between Nundo Lal's solicitor, and his son and his friend Nilratan Sen, the solicitor, Hirendra Nath Dutta followed Mr. Mitter into [448] Court and made the observations which he states in paragraph 47 of his affidavit and which are corroborated by the son Benode Behary Bose. Mr. Mitter admits that something to the effect stated by Hirendra Nath Dutta passed, but he says that he does not recollect the exact words, but that something was said about responsibility in the matter is apparent, not only from the evidence filed on behalf of the appellant, but also from that filed on behalf of the respondent, and Babu Gonesh Chunder Chunder, though he denies hearing what Babu Hirendra Nath Dutta says he said as to his client not being willing to settle the suit, admits that he heard something being said about responsibility in settling the suit, but that he regarded it as a joke. It must be remembered in this connection that only an hour or two previously Gonesh Chunder Chunder himself had heard Nundo Lal say that he would not pay the plaintiff's costs and why should he settle the suit.

Looking then at the evidence, as a whole, I am satisfied that Nundo Lal Bose did not authorize his counsel Mr. Mitter to accept the terms of the proposed compromise.

It is contended, however, that, as the respondents were not told that Mr. Mitter had no authority to settle, the appellant is bound. I am unable to take that view. Counsel no doubt has an apparent authority to compromise the case in which he is retained, and the other side are entitled to rely upon the continuance of that apparent authority, until they receive notice that it has been determined. But that principle does not apply to the present case, where an express or special authority was requisite. The respondent must be taken to know that as this compromise covered matters outside the scope of the suit an express authority to Mr. Mitter to settle was requisite, and if, in fact, that authority were not given, the respondents cannot avail themselves of the position that they did not know that it had not been given. They were not entitled to assume as in the case of an apparent authority that it was given and was existing. This is pointed out by Crowder, J., in the case of *Swinfen* v. *Swinfen* (1). That learned Judge says; "If therefore in such a case (*i.e.*, a case of special authority given) a counsel under a misapprehension of his client's [449] instructions, and believing himself to have authority, acts in fact without it, he cannot in my opinion bind his client."

In this view it becomes immaterial to consider whether such a compromise, even if otherwise binding, should have been adopted by the Court in the absence of Kadumbini Dassi, though I must confess I feel considerable doubt upon the point, nor is it necessary to decide the question, whether it was competent to the Court by this compromise decree not made in the presence of all the members of the family of Nundo Lall Bose and Pasupati Nath Bose, to virtually set aside the decree of the 29th August 1889, which had declared that certain portions of the property in dispute were clothed with a *Debutter* character, and to direct part of the property to be divided between Nundo Lal Bose and Pasupati Nath Bose.

For the reasons I have given, the appeal must succeed and the order of the Court below must be discharged, and Nundo Lall Bose must have the costs of the motion in the Court below.

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(1) (1857) 1 C. B. N. S. 364.

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As regards the costs of this appeal, seeing that the respondents have at the bar offered to the appellant all that, and even more than he had previously asked for with a view of putting an end to this litigation, there will be no costs of this appeal.

MACPHERSON, J.—I agree.

HILL, J.—I also agree.

Attorney for the defendant appellant, Nundo Lall Bose: Babu *Hirendra Nath Dutta.*

Attorney for the plaintiff respondent, Nistarini Dassi: Babu *Rames Chandra Basu.*

Attorneys for the defendant respondent, Pasupati Nath Bose: Messrs. *G. C. Chunder & Co.*

Attorney for the defendant respondent, Kadumbini Dassi: Mr. *J. C. Dutt.*

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27 C. 450.

[450] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

AIUNDDI SHEIKH AND OTHERS (*Petitioners*) *v.* QUEEN-EMPRESS (*Opposite-Party*).* [31st January, 1900.]

Forest Act—Conviction for offence under—Subsequent order for confiscation of boats—Confiscation a punishment—When such order should be made—Indian Forest Act (VII of 1878), *ss.* 25 *and* 54.

Certain accused persons were tried summarily and convicted under s. 25 of the Indian Forest Act, and sentenced to pay fines. By a subsequent order under s. 54 of the same Act their boats were confiscated. *Held*, that under the terms of s. 54 an order of confiscation cannot be regarded as an order incidental on the conviction. The confiscation is by the terms of that section declared to be a punishment, for it is in addition to any other punishment prescribed for the offence.

That, being a punishment, the order should have been passed simultaneously with the other punishment for the offence, of which the accused have been convicted.

Empress v. *Nathu Khan* (1) referred to.

[D., 25 A.W.N. 143 (144).]

THE accused who had permits to fell *sundri* poles in the Satkhira circle, under colour of the permits, cut *sundri* poles and logs in the Bagirhat circle. The accused were tried summarily and convicted under s. 25 of the Indian Forest Act by the Deputy Magistrate of Bagirhat and sentenced to pay a fine of rupees twenty-five each, or in default suffer rigorous imprisonment for one month each, and that out of the fine when realized rupees one hundred should be paid to the Forest Department. By a subsequent order under s. 54 of the same Act the accused had their boats confiscated.

Babu *Provash Chunder Mitter*, for the petitioner.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

We have had some difficulty in ascertaining the facts of this case relating to a breach of the rules passed under the Forest [451] Act in

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* Criminal Revision Nos. 826, 828 and 835 of 1899, made against the order passed by Babu Prassanna Kumar Karfarmar, Deputy Magistrate of Bagirhat, dated the 29th of March 1899.

(1) 4 A. 417.

which the petitioners have been convicted and sentenced to a fine, and by a subsequent order have had their boats confiscated under s. 54. The matter has been tried under summary procedure, and although it may be admitted that the object of this procedure is to shorten the course of the trial, it was nevertheless incumbent upon the Magistrate to put on record sufficient evidence to justify his order.

The rule before us relates to the order of confiscation of boats belonging to the petitioners. The evidence regarding the use of these boats for purposes forbidden by the rules passed under the Forest Act by no means proves that the boats belonging to the petitioners were used for illegal purposes. But in addition to this, we are of opinion that the order for confiscation cannot be maintained on the authority of the case of *Empress* v. *Nathu Khan* (1). Under the terms of s. 54 of the Forest Act, an order of confiscation cannot be regarded as an order incidental on the conviction. The confiscation is by the terms of that section declared to be a punishment, for it is in addition to any other punishment prescribed for the offence. Having regard to the terms of the law, we agree with the judgment cited that, being a punishment, the order should have been passed simultaneously with the other punishment for the offence of which the petitioners have been convicted. On both grounds, therefore, we think that the order of confiscation cannot be sustained, and that the boats must be restored to the petitioners.

No. 828. In the case of Jaun Mirdha there is, we think, sufficient evidence to identify the boats as being the boats seized by the forest officers on finding a breach of the law on the part of the petitioner. But in this case, the objection taken in the case of *Empress* v. *Nathu Khan* (1) also applies. The order for confiscation was not passed, until a considerable time after the order of conviction. We think, therefore, that on this ground the order of confiscation must be set aside and the boats restored to the petitioner.

No. 835. The case of Basir Sheikh is exactly similar to that of Jaun Mirdha, and the order of confiscation must be set aside and the boats restored for the same reasons.

D. S.

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27 C. 452=4 C.W.N. 594.

[452] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

RAMASORY LALL (*Petitioner*) v. QUEEN-EMPRESS (*Opposite-party*).*
[27th February, 1900.]

Sanction—Information by accused of offence—Report by police of falsity of information—Sanction by District Magistrate on police report—Judicial proceeding—Subordination of Police officer to District Magistrate—Complaint—Criminal Procedure Code (*Act V of* 1898), *ss.* 195 *and* 480—*Penal Code* (*Act XLV of* 1860), *s.* 182.

The accused gave certain information to the police, who after investigating the matter reported that the information given was false and constituted an offence under s. 182 of the Penal Code. The District Magistrate on this sanctioned the prosecution of the accused, who was convicted and sentenced under that section. The accused appealed against the conviction and sentence. His appeal was heard

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* Criminal Revision No. 899 of 1899, made against the order passed by F. W. Ward, Esq., Assistant Magistrate of Champaran, dated 2nd September 1899.

(1) 4 A. 417.

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27 C, 452= 4 C.W.N. 594.

and dismissed by the District Magistrate, who had previously sanctioned his prosecution. On revision the accused contended that the District Magistrate having sanctioned his prosecution on the Police report was not competent to hear the appeal.

Held, that s. 487 of the Code of Criminal Procedure did not apply, as the offence was not committed before the District Magistrate, nor was it in contempt of his authority, nor brought to his notice in the course of a judicial proceeding.

Held, further, that although police officers in a district were generally subordinate to the District Magistrate, the subordination contemplated by s. 195 of the Code of Criminal Procedure was not such subordination. That subordination contemplated some superior officer of police. Nor could the report of the police officer be regarded as a complaint under s. 195 of the Code of Criminal Procedure, and therefore no proper sanction had been obtained. The defect, however, was cured by s. 537 of the Code of Criminal Procedure, as no failure of justice had been occasioned.

[Diss., 27 A. 292=1 A.L.J. 597 (598)=24 A.W.N. 231; F., 1 L.B.R. 101 (104); R., 32 C. 180 (184); 11 Cr.L.J. 252=5 Ind. Cas. 829=6 P.R. 1910 Cr.=170 P.L.R. 1910=10 P.W.R. 1910 Cr.; 5 O. C. 164 (166); 6 O. C. 1 (5, 8).]

ONE Sheonarain had lately married a girl of ten, named Manorma, who was the sister of the accused. About a fortnight after the marriage the girl went with a maid-servant to live with her husband, who dismissed the maid a few days afterwards. The maid went to the accused and told him that Sheonarain was acting improperly to his wife. Accused went at once to Sheonarain and asked him to allow his wife to go to her home and remain there, till she had attained puberty. Sheonarain refused. That same evening the accused sent a telegram to the District Superintendent [453] of Police of Motihari, stating that he suspected Sheonarain would kill Manorma that night and to send the police even by goods train. The telegram was sent to the Sub-Inspector with orders to inquire into the case at once. The Sub-Inspector reported that the information given by the accused by telegram was false, and constituted an offence under s. 182 of the Penal Code. The District Magistrate of Champaran on this sanctioned the prosecution of the accused. The accused was convicted under s. 182 of the Penal Code and sentenced to a fine of Rs. 30 by the Assistant Magistrate of Champaran.

Against this decision the accused appealed, and his appeal was heard and dismissed by the District Magistrate of Champaran who had previously sanctioned his prosecution.

Mr. *Swinhoe* (Babu *Dasarathi Sanyal*, with him) for the petitioner contended that inasmuch as the District Magistrate under s. 195 of the Code of Criminal Procedure sanctioned the prosecution of the petitioner on the police report, he was not competent under s. 487 of that Code to hear the appeal.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

The petitioner has been convicted under s. 182 of the Penal Code and sentenced to a fine of Rs. 30 and his appeal has been dismissed.

A rule has been granted to consider the objection now raised that as the District Magistrate gave sanction to the prosecution on the police report he was not competent to hear the appeal. Section 487 of the Code of Criminal Procedure which has been relied upon does not apply to this case, because the alleged offence was not committed before the District Magistrate, nor was it in contempt of his authority, nor was it brought to his notice as a Magistrate in the course of a judicial proceeding.

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The Sub-Inspector reported the information given by the petitioner by telegram to be false and to constitute an offence within the terms of s. 182 of the Penal Code. The [454] District Magistrate on this sanctioned the prosecution of the petitioner, who admittedly gave that information. Under s. 195 of the Code of Criminal Procedure, the sanction or complaint of the public servant concerned or of some public servant to whom he is subordinate was necessary before proceeding under s. 182 of the Penal Code could be taken. Now, although police officers in a district are generally subordinate to the District Magistrate, we think that the subordination contemplated by s. 195 of the Code of Criminal Procedure is not such subordination. That subordination contemplates some superior officer of police. Nor would the report be regarded as a complaint, because the definition of "complaint" excludes the report of a police officer. No proper sanction was therefore obtained. But although s. 195 declares that no Court shall take cognizance of any offence under s. 182 of the Penal Code except with previous sanction or complaint as specified, s. 537 declares that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on account of the want of any sanction required by s. 195, unless such want has in fact occasioned a failure of justice. Here we cannot find that the want of sanction has so resulted. The information given was manifestly false, and was known to be so, for the petitioner had no valid ground for requiring the intervention of the police because he had reason to believe, as he stated, that his brother-in-law was about to kill his wife, and he knew that, if the true state of the facts had been shown to the police, the Sub Inspector would not have left his other duties to go to the spot. From the nature of the case the offence has been properly punished with fine.

The rule is therefore discharged.

D. S. *Rule discharged.*

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27 C. 455 = 4 C.W.N. 249.

[455] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

HARI CHARAN SINGH (*Petitioner*) v. QUEEN-EMPRESS (*Opposite party*).*
[11th January, 1900.]

Evidence—False evidence—Examination on oath of person by Magistrate for purpose of obtaining information in order to take proceedings—Whether such person a witness—Contradictory statement made by such person at trial as witness—Code of Criminal Procedure (Act V of 1898), *s.* 190, *cl.* (*c*)—*Indian Oaths Act* (*X of* 1873), s. 5—*Indian Penal Code* (*Act XLV of* 1860), ss. 191 *and* 193.

Held, that where an accused person was examined by a Magistrate for the sake of obtaining information on which proceedings could be taken, the Magistrate, although he might examine him to obtain information, could not legally examine him on oath, nor could the accused be said at that stage of the proceedings to be a witness even though he were examined on oath. There was no authority that being so examined the accused was bound by any express provision of law to state the truth.

Consequently any charge for giving false evidence founded on this statement was bad, and it therefore followed that a conviction and sentence founded on

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* Criminal Revision No. 775 of 1899, made against the order passed by F. S. Hamilton, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated 16th September 1899.

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27 C. 455 = 4 C.W.N. 249.

this statement as being contrary to another statement made by the accused when examined a witness at the trial, without any proof or finding that the second statement was false could not be maintained.

[Diss., 8 Bom.L.R. 589 (597); Rel., 12 Cr.L.J. 326 = 10 Ind. Cas. 622 = 7 N.L.R. 65.]

AN accused person was charged with a breach of the Coolie Emigration Act, and was acquitted on the ground that he was not responsible being a servant of some one who might have transgressed the law. The Magistrate in passing this order was inclined to proceed against the master, but before doing so he wished to ascertain clearly whether there were sufficient grounds for his taking action, that is to say, for his proceeding under s. 190 (*c*) of the Code of Criminal Procedure to take cognizance of the offence. He accordingly examined the accused on oath, and thereupon summoned the master to appear before him and answer a charge under the Coolie Emigration Act. At the trial, the accused was examined as a witness, and he then gave evidence contradicting the former statement that he had made to the Magistrate. The accused was prosecuted and convicted under s. 193 of the Indian Penal Code and sentenced to three months' rigorous imprisonment.

[456] On appeal the conviction and sentence were confirmed.

Babu *Atulya Charan Bose*, for the petitioner.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

The petitioner before us was charged with a breach of the Coolie Emigration Act, and was acquitted on the ground that he was not responsible, being a servant of some one who might have transgressed the law. The Magistrate, in passing this order, was inclined to proceed against the master, but, before so doing, he wished to ascertain clearly whether there were sufficient grounds for his taking action, that is to say, for his proceeding under s. 190 (*c*) of the Code of Criminal Procedure to take cognizance of the offence. He accordingly examined the petitioner on oath, and he thereupon summoned the master to appear before him and answer a charge under the Coolie Emigration Act. At the trial, the petitioner was examined as a witness, and he then gave evidence contradicting the former statement that he had made to the Magistrate. He has accordingly been prosecuted and convicted by the Magistrate for having intentionally given false evidence by reason of such contradictory statements, which were not reconcileable. On appeal the conviction and sentence were confirmed. An objection has been taken before this Court on which a rule has been granted that the conviction and sentence are contrary to law, inasmuch as no offence is established. Now, in order to establish the offence found, it was necessary to prove that both the contradictory statements were such that a charge of giving intentionally false evidence might have been made in regard to either of them or in regard to both of them in the alternative. The question, therefore, arises whether the first statement was a statement coming within the terms of s. 191 of the Penal Code, which defines the offence of giving false evidence. There was at that time, it may be observed, no case before the Magistrate, and the examination was directed simply to obtain information upon which a case might be started against some person not before the Court. The Indian Oaths Act, s. 5, declares **[457]** that oaths or affirmations shall be made by the following persons : "All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give,

evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence." Now, the petitioner was at that stage of the proceedings certainly not a witness. He was examined by the Magistrate for the sake of obtaining information on which proceedings could be taken, and, therefore, the Magistrate, although he might examine him to obtain information could not, as we understand the law, examine him on oath. Moreover, there is no authority that, being so examined, the petitioner was bound by any express provision of law to state the truth. Consequently, any charge for giving false evidence founded on this statement is bad, and it therefore follows that the conviction and sentence founded on this statement as being contrary to another statement without any proof or finding that the second statement was false cannot be maintained. The conviction and sentence must, therefore, be set aside and the rule made absolute.

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D. S. *Rule made absolute.*

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27 C. 457.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

DURGA CHARAN JEMADAR AND OTHERS (*Petitioners*) v. QUEEN-EMPRESS (*Opposite Party*).* [2nd March, 1900.]

Arrest—Warrant of arrest directed to police-officer—Endorsement of warrant by another police-officer to process-serving peons—Legality of such endorsement—Peons not police-officers—Arrest by peons—Rescue of persons arrested—Whether lawful arrest—Code of Criminal Procedure (Act V of 1898), *ss.* 68 *and* 79.

A warrant of arrest was endorsed over to a Court Sub-Inspector for execution. The Court Sub-Inspector being away the Court Head-Constable by an order in writing signed by himself endorsed this warrant over to two process-serving peons for execution. The peons arrested a number of men under the warrant, some of whom were forcibly rescued by the accused and other persons. The accused were convicted under various sections of the Penal Code of rescuing the persons arrested and obstructing the execution of the warrant of arrest.

[458] *Held*, that the endorsement of the warrant by the Court Head-Constable to the peons did not make them competent to execute the warrant, that, even if the peons had been legally appointed, they could not have made the arrest, inasmuch as they were not police-officers within the terms of s. 79 of the Code of Criminal Procedure.

The terms of s. 79 are express in this respect, and no other person except a police-officer is competent to execute a warrant of arrest under an endorsement from another police-officer.

THE manager of the Kollain Tea Estate obtained a warrant for the arrest of certain agreement coolies, who had absconded from his garden and gone to another tea garden. This warrant was endorsed over to the Court Sub-Inspector for execution. The Court Sub-Inspector was away at the time, and the Court Head-Constable acting for him. The warrant was by an order in writing signed by the Court Head-Constable endorsed for execution by two process-serving peons of the Deputy Commissioner's Criminal office of Silchar. The peons succeeded in arresting a number of coolies under the warrant. Some of the coolies were forcibly rescued by the accused and other persons. The first accused was convicted by the

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* Criminal Revision No. 952 of 1899, made against the order passed by Bernard V. Nicholl, Esq., Sessions Judge of Cachar, dated the 6th of October 1899.

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Assistant Commissioner of Silchar under ss. 143, 225B, 341 and 353 of the Penal Code, and the remainder under the first three of the above sections and sentenced to various terms of imprisonment. The appeal preferred by the accused was dismissed by the Sessions Judge of Cachar.

Mr. *Swinhoe* (Babu *Prosonno Gopal Roy*, with him), for the petitioners. —The conviction of the accused is bad and cannot stand. The execution of the warrant by the peons did not constitute a lawful arrest, therefore the rescue by the accused of the persons so arrested was no offence. The warrant was addressed to the Court Sub-Inspector, and under s. 79 of the Criminal Procedure Code he alone could endorse it to some other police-officer. The Court Sub-Inspector was absent, and the Magistrate says the Court Head-Constable was acting for him; that, however, is not sufficient; there is nothing to show that the Court Head-Constable was at that time actually filling the office of Court Sub-Inspector, so that the Court Head-Constable had no authority to endorse the warrant, without, in the first place, getting it endorsed to **[459]** himself. Then, again, s. 79 requires the warrant to be endorsed to a police-officer, and process-serving peons can in no way be regarded as police-officers, so that, even if the warrant had been lawfully endorsed, the two peons, not being police-officers as required by that section, were not competent to make the arrest.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

The petitioners have been convicted, Durga Jemadar under ss. 353, 225B, 143 and 341 of the Indian Penal Code, and Hari Manjhi under ss. 143, 341 and 225B, of the Indian Penal Code, and their offences may be shortly described as rescuing four persons who had been arrested and otherwise obstructing the execution of the warrant of arrest.

The only point for our consideration in this case is whether the warrant was being rightly executed so as to make the arrest lawful and the obstruction thereto an offence. The warrant was addressed to the Court Sub-Inspector, and it was by an order in writing, signed by the Court Head-Constable, endorsed for execution by Churai Nath, and Guana Nath, and these two persons made the arrest which led to the occurrence constituting the offences of which the petitioners have been convicted.

It was contended both before the Magistrate and before the Sessions Judge in appeal that the execution of the warrant by these persons did not constitute a lawful arrest inasmuch as the officer to whom the warrant was directed did not lawfully endorse it to these persons, and it was further contended that, even if it had been lawfully endorsed, these two persons, not being police-officers, were not competent to make the arrest.

We think that on both points the objections are good. We observe from the Magistrate's judgment that he states that the Court Sub-Inspector "was away then, and the Court Head Constable acting for him" made the endorsement in question. Now, unless the Court Head-Constable was at that time actually filling the office of Court Sub-Inspector, any temporary arrangements made for the conduct of the office during the absence of the Court Sub-Inspector would not constitute him a Court Sub-Inspector for the purpose of endorsing this warrant. It would be **[460]** a matter of no difficulty for the Court Head-Constable, if he had realized the consequences, to have obtained the entry of his own name on the face of the warrant as one of the persons to whom it was directed

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for execution. The endorsement, therefore, for service by these two persons did not make them competent to execute the warrant.

The second objection is also good because these persons, even if they had been legally appointed, could not have made the arrest, inasmuch as they were not police-officers. The Sessions Judge in appeal, as well as the Magistrate, got rid of this objection by considering that these two persons being persons on the process-serving establishment of the Court, should be regarded as police-officers within the terms of s. 79 of the Code of Criminal Procedure. We think that the terms of s. 79 are express in this respect, and that no other person except a police-officer is competent to execute a warrant of arrest under an endorsement from another police-officer. And in regard to the opinions expressed by the Sessions Judge and the Magistrate, we would draw attention to the difference between the service of a summons and the execution of a warrant of arrest. Section 68 declares that a summons shall be served by a police-officer or subject to such rules as the Local Government may prescribe in this behalf by an officer of the Court issuing it or other public servant. It is by reason of this provision that such officers as the two persons named in the endorsement are competent to act as process servers for the purpose of serving summonses and such processes, but under the terms of s. 79 they cannot by reason of such office be properly regarded as police-officers. The conviction must, therefore, be set aside, and the petitioners acquitted, the rule being made absolute.

D. S. *Rule made absolute.*

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27 C. 461=4 C.W.N. 467.

[461] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

NATABAR GHOSE (*Petitioner*) *v.* PROVASH CHANDRA CHATTERJEE (*Opposite party*).* [15th February, 1900.]

Presidency Magistrate, Judgment of—Sentence of imprisonment—Reasons for conviction to be recorded—Code of Criminal Procedure (Act V of 1898), s. 370, *cl (i)—Penal Code (Act XLV of* 1860), s. 408.

Section 370 of the Code of Criminal Procedure requires that in a case in which the accused is sentenced to imprisonment a Presidency Magistrate shall record a brief statement of the reasons for the conviction.

It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reasons for the conviction.

THE accused was charged with an offence under s. 408 of the Penal Code. On the night of the 25th of December 1899 one Nonee Bala gave the accused, who was a servant of her uncle, a pair of gold *balas* and a chemise to take to her dressing-room. She subsequently missed them, and the accused was also missing. Upon search being made for him he was found and caught at the Sealdah Railway Station. On being questioned the accused stated that he had put the articles in the dressing-room, but later on he stated that he had given them to one G, to keep for him. The accused was taken to the house of G, who admitted having received the *balas* from the accused, and promised to return them, but

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* Criminal Revision No. 107 of 1900, made against the order passed by Syed Amir Hossein, Presidency Magistrate of Calcutta, dated the 29th December 1899.

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subsequently denied all knowledge of them. The accused was convicted under s. 408 of the Penal Code. The judgment of the Presidency Magistrate was as follows: "The charge is proved against No. 1. He has no defence to make. I convict him under s. 408 of the Penal Code and sentence him to four months' rigorous imprisonment."

Babu *Brojo Lal Chakravarti*, for the petitioner.—The judgment is defective as the Magistrate does not give any reason for the conviction as required by s. 370, cl. (*i*) of the Code of Criminal **[462]** Procedure. The conviction for criminal breach of trust is wrong as there is no evidence to prove that the articles were misappropriated by the petitioner. A great part of the evidence for the prosecution has been disbelieved as the second accused has been discharged. I submit the charge against my client is not proved. *Yacoob* v. *Adamson* (1).

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows:—

JUDGMENT.

Section 370 of the Code of Criminal Procedure requires that in a case such as that now before us, the Magistrate should record a brief statement of the reasons for the conviction. The Magistrate has failed to comply with the law. He has recorded no such reasons as are contemplated by s. 370. It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reasons for the conviction. We have accordingly considered the whole case, and, although we agree with the Presidency Magistrate that the accused should be convicted, we think that he should have been convicted of theft as a servant rather than of criminal misappropriation. The error, however, is immaterial, as it has not prejudiced the accused. The rule is, therefore, discharged.

D. S. *Rule discharged.*

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27 C. 462 = 4 C.W.N. 158.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

KOKA MAHTON AND OTHERS (*Plaintiffs*) *v.* MANKI JAGAR NATH SAHI (*Defendant*).* [22nd December 1899 and 5th January, 1900.]

Chota Nagpore Encumbered Estates Act (VI of 1876), ss. 2,3 (c), 4-12—Meaning of the words "holder" and "heir"—Capacity to mortgage.

[463] The words "holder" and "his heir" are used throughout the Chota Nagpore Encumbered Estates Act in the sense of the *holder* of the property *at the time* of the determination of the debts and liabilities under s. 8 of the Act and *his* heir. The word "heir" in the Act always applies to the person who is the holder's heir at the time of such determination of the debts and liabilities and to no other heir, nor to the heir's heir.

The estate of *F* came under management under the Chota Nagpore Encumbered Estates Act in 1880. He had several sons, of whom *B* was the eldest and *J* the next in age. *F* died in 1884, and according to the custom of the family,

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* Appeal from Appellate Decree No. 1429 of 1898, against the decree of F.B. Taylor, Esq., Judicial Commissioner of Chota Nagpore, dated the 28th of April 1898, reversing the decree of Babu Atal Behari Ghose, Subordinate Judge of Ranchi, dated the 27th of August 1896.

(1) 13 C. 272.

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B succeeded him to the estate, and on *B* dying in 1892 without leaving a male issue, *J* succeeded him. On the 8th June 1884, *J* mortgaged a village which had been granted to him by his father for his maintenance, and which never came under the management of the Encumbered Estates.

Held, that there was nothing in s. 3, cl. (*c*), of the said Act to incapacitate *J* from mortgaging the property.

The object of Act VI of 1876 *explained*.

THE present suit was brought by Koka Mahton and others against Manki Jagar Nath Sahi for the recovery of a mortgage debt, due on a bond, dated the 8th June 1884, in which a village named Kamta was mortgaged as security for the debt. The defendant admitted the execution of the bond, but pleaded that the consideration-money was not paid; and contended further that according to s. 3, cl. (*c*), of Act VI of 1876, the defendant had no authority to make any contract, and therefore the bond was null and void.

It appears that the estate of one Manki Faninder came under management under Act VI of 1876 on the 23rd April 1880. Manki Faninder was the father of one Bhola Sahi, the eldest son, Jagar Nath Sahi, the defendant, and two younger sons. According to the custom of the family, after the death of Faninder in 1884, Bhola Sahi succeeded to the estate, and Bhola Sahi having died in 1892 without any male issue, the defendant succeeded to the estate as *malik*, the estate having all the time continued under management under Act VI of 1876. It appeared also that the village Kamta, mortgaged by the defendant, was his *korposh* village obtained from his father for his maintenance, and that it never became a part of the encumbered estate.

The Subordinate Judge found that the plea of the defendant that the consideration-money had not been paid was not made out; he further held that the defendant was not the "heir" of **[464]** Bhola Sahi, whose estate was under management under Act VI of 1876, when the bond in suit was executed, and that it could not therefore be held to be null and void. He accordingly decreed the suit.

On appeal, the Judicial Commissioner agreed with the lower Court as to the consideration for the bond, but held that the defendant-appellant was the "heir" of the holder of the estate within the meaning of the Act at the time the bond was executed, and as heir he was incapacitated from alienating or charging any immoveable property, although such property might have no concern with the encumbered estate. He accordingly held that s. 3, cl. (*c*), of the Act rendered the defendant incapable of entering into the contract, and allowed the appeal and dismissed the suit.

The plaintiffs appealed to the High Court. The case came on for hearing on 22nd December 1899.

Dr. *Rash Behary Ghose*, and Babu *Jogesh Chundra Dey*, for the appellants.

Babu *Kally Kishen Sen*, for the respondent.

Cur. adv. vult.

Jany. 5, 1900. The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows :—

JUDGMENT.

This is an appeal against an order of the Judicial Commissioner of Chota Nagpore, dated the 28th April 1898.

The suit is one in which the plaintiffs seek to enforce a mortgage bond, dated 8th June 1884, and the defendant pleads that under s. 3, cl. (*c*), of Act VI of 1876 (the Chota Nagpore Encumbered Estates Act) he

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could not contract, and so the bond is null and void. Both Courts have found that the defendant duly received the consideration-money of this bond.

The Subordinate Judge held that the bond was valid, while the Judicial Commissioner has allowed the defendant's plea as to his incapacity to contract, and has dismissed the suit.

The facts are that the estate of one Manki Faninder came under management under Act VI of 1876 on the 23rd April 1880. Faninder had then two sons: Bhola, who had no son, and Jagar Nath, the present defendant-respondent. Faninder died [465] in 1884, and Bhola succeeded him. Bhola died on the 19th June 1892, and the defendant Jagar Nath succeeded him. The plaintiffs instituted this suit on the 17th September 1895.

The question then is whether the bond executed by the present defendant-respondent after the death of Faninder, when Bhola had succeeded to his father, is null and void or not.

For the defendant-respondent it is contended, and this is the view taken by the Judicial Commissioner that it is void: (1) because Jagar Nath, when he executed it was the heir to Bhola, the holder of the immoveable property for the time being who had then no son, and that therefore under s. 3, cl. (*c*), he could not contract; (2) that although the property is not part of the encumbered estate taken charge of under the Act, still, under s. 3, the holder and his heir are incapacitated from alienating or encumbering not merely the encumbered estate, but their immoveable property or any part thereof, the object of the Act according to this view being to prevent any one who may at any time succeed to the estate from contracting debts which may in any way interfere with the preservation of their property in its entirety.

On the other hand, on behalf of the appellant it has been argued: (1) that Jagar Nath was not Bhola's heir at the time of the execution of the mortgage bond; (2) that in any case he was not the heir to Faninder; and that under s. 3, cl. (*c*), it is only Faninder's heir that was incapacitated from contracting; (3) that the property mortgaged was no part of the encumbered estate, and that it is not the intention of the Act to protect the property of any successor to the holder of the estate at the time of its management being undertaken, or to incapacitate such successor from in any way alienating or charging it.

It is not necessary on the view we take of this case to deal with the first and third of these pleas. We may, however, observe incidentally that we think the word "heir" appears to us to be used in the Act in its ordinary acceptation rather than its strictly legal intendment, and further, that the Judge appears to us to be right in the view he takes of s. 3 incapacitating the holder of immoveable property and his heir from alienating or charging their immoveable property or any part thereof. [466] But the question remains: Can the defendant Jagar Nath be said to be the heir of the holder of the said immoveable property within the meaning of s. 3 of the Act?

Undoubtedly Faninder was the "holder" of the immoveable property when its management was undertaken under the Act and Bhola Nath was his heir. At first sight it may appear that on the death of Faninder, Bhola became the holder of the estate, and Jagar Nath his heir. But on consideration we do not think that this is the meaning of s. 3. In the first place it will be seen that under s. 2 what vests in the manager is "the management of the whole or any portion of the immoveable property of or to which

the said holder is then possessed or entitled in his own right, or which he is entitled to redeem or which may be acquired by or devolve on him *or his heir* during the continuance of such management." Thus, it is the holder's property and the property which may be acquired by or devolve on him or his heir which the manager is to manage, and it is such holder and his heir who are precluded from alienating or charging their property, and it would seem that it is such holder and his heir (but not the latter's heir) who are declared by s. 3, cl. (*c*) incapable of contracting.

Then, it will be seen from s. 4 that the manager during his management of the said property (*i.e.*, of the holder at the time the management is undertaken and the property which may be acquired by or may devolve on him or his heir) is to deal with the profits in a certain way, and to apply the residue in discharge of the debts and liabilities of the holder of the property and his heir "under the provisions hereinafter contained."

These provisions are contained in ss. 5 to 12. From these it appears the manager is to prepare a schedule of the debts and liabilities due to the creditors of the holder and to persons holding mortgages, &c., at the time of such determination. Debts not notified to the manager within three months are as a rule to be barred. A scheme for the settlement of such debts is to be submitted to the Commissioner, and finally as soon as such debts and liabilities are paid off, the estate is to be released from management.

From these provisions it would seem to us to follow: (1) that Act VI of 1876 provides a system for the management of property not in consequence of the incapacity of the owner of such [467] property to manage it, but with the object of paying off certain specified debts, and for this purpose the property is for a time placed beyond the jurisdiction of the Civil Courts; (2) that it is the property of the holder at the time of the determination of these debts and the property which may be acquired by or devolve on him or his heir that the manager is vested with the management of, and that it is such holder and his heir who cannot alienate or charge their immoveable property and who cannot contract. The terms "holder" and "his heir" appear to us to be throughout the Act used in the sense of the holder of the property at the time of the determination of the debts, and his heir. They are, we think, employed in no other sense. If the holder at the time of the determination of the debts dies, his heir no doubt in one sense becomes the holder of the property, being his successor, but we do not consider that on this account he becomes the holder of the property within the meaning of the Act, so that his heir becomes the heir referred to in s. 3 of the Act. The word "heir" in the Act in our opinon always applies to the person who is the holder's heir at the time of the determination of the debts and liabilities as provided in s. 8 and to no other heir.

It may be said that the Act must surely contemplate and provide for the event of the death of the holder of the property. But it seems to us that it was unnecessary for it to do so. As soon as the debts of the holder of the property have been determined under s. 8, it is immaterial how the property may devolve. The manager continues to manage the property of the original holder or his heir, and when the debts, to pay off which the management has been undertaken, have been paid off, the work of the manager is finished and the property released.

That being so, we conclude that in this case the holder of the property and his heir referred to in s. 3 of the Act were Faninder and Bhola, and

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that the provisions of this section in no way incapacitated the defendant Jagar Nath from contracting. The mortgage bond on which the plaintiffs sue is accordingly not void, and the plaintiffs are entitled to recover.

For these reasons we decree this appeal with all costs.

M. N. R. *Appeal decreed.*

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27 C. 468.

[468] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

HURNANDUN SINGH AND OTHERS (*Defendants, 2nd Party*) *v.* JAWAD ALI (*Plaintiff*) AND ANOTHER (*Defendant, 1st Party*).*
[1st December, 1899.]

Specific Relief Act (*I of* 1877), *s.* 27 (*b*)—*Suit for specific performance of contract to sell land—Person claiming by subsequent title—Nocice of prior contract—Transfer of Property Act* (*IV of* 1882), s, 54—*Contract for sale*—Bainanamah—*Legal and equitable rights—Registration Act* (*III of* 1877), *ss,* 17 (*h*), 48,50—*Document creating a right to obtain another document—Unregistered document—Admisssibility of evidence.*

On the 27th December 1895, *S* executed an unregistered document bearing a one-anna receipt stamp, in favour of J, agreeing to execute a deed of conveyance of a certain immoveable property in favour of J within a certain time, and acknowledging receipt of earnest money. Subsequently, on the 3rd January 1896, *S* executed a registered *bainanamah* in respect of the same property in favour of *R* and *H*, which was followed by a registered deed of conveyance in their favour, dated the 9th January 1896, and delivery of possession, although *R* and *H*, had notice of the previous contract with *J* before the registration of the *bainanamah* and execution of the deed of conveyance in their favour.

Held, that, having regard to s. 54 of the Transfer of Property Act and s. 27 (*b*) of the Specific Relief Act, in a suit for the specific performance of contract brought by *J*, neither the *bainanamah* nor the deed of conveyance in favour of *R* and H could prevail against the prior unregistered contract of *J*.

Held, further, that the unregistered document of the 27th December 1895, came under s. 17, cl. (*h*) of Act III of 1877, and was not inadmissible in evidence for want of registration; and that the registered *bainanamah* of the 3rd January 1896 did not take effect against it, under s. 50 of that Act.

[R., 15 P.R. 1908=97 P.L.R. 1908=27 P.W.R. 1908.]

THE plaintiff, Sheik Jawad Ali, brought the present suit against Mussummat Shama, the defendant first party, and Rambudun Singh, Hurnandun Singh and Sheik Sabi Buksh, the defendants second party, to enforce specific performance of an agreement to execute a *kobala* in his favour.

The agreement, which was written on a paper bearing an one anna receipt stamp, was in the following terms:—

"Whereas I the declarant have finally completed the negotiations for the sale of 7 annas 9 gundas 1 cowri 1 krant out of the entire 16 annas [469] of *jagir* Bhawani Singh Havildar, Thana Agarpur, Purgana Bhagulpur, the towzi No. whereof is 1047 and the *sadar jama* of the entire *jagir* is Rs. 6-11, with Sheik Jawad Ali, son of Sheik Mohur, deceased, inhabitant of Mouzah Anandpur, Purgana Bhagulpur, at a price of Rs. 1,200, and have received Rs. 25 by way of earnest money out of the said consideration money, I shall execute the *kobala* for the same within ten days. I have,

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* Appeal from Appellate Decree No. 52 of 1898, against the decree of C. M. W. Brett, Esq., District Judge of Bhagulpure, dated the 11th of December 1897, reversing the decree of Nuffer Chunder Bhutta, Subordinate Judge of that District, dated the 30th of April 1897.

therefore, put in writing these few words by way of receipt for the earnest money that they may be of service when required. Dated the 25th Pous 1303 Fusli."

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27 C. 468.

This agreement, Ex. (*a*), it will be seen, was executed on the 27th December 1895. It appears that subsequently, *i.e.*, on the 3rd January 1896, Mussummat Shama executed another *bainanamah* for the sale of the identical property in favor of the defendants second party, Rambudun Singh and Hurnandun Singh, at a price of Rs. 1,260, out of which the receipt of Rs. 20 was acknowledged, and that document was registered later on in the course of the same day. The *bainanamah* was in the following terms :—

" Whereas 28 bighas out of the entire 16 annas of the land, Jagir Bhawani Singh Havildar, situate in *mouzah* Sadpur Koila, Thana Agarpur, Pergana Kahlagaon, bearing *towzi* No. 1047 and a *sadarjama* of Rs. 6-11 form the proprietary right of me, the declarant, and the same have all along been in my possession and occupation. At present I have a mind to sell the said lands. I have therefore finally completed the negotiations for the sale of the same, at a price of Rs. 1,260, with Rambudun Singh and Hurnundun Singh, sons of Babu Sheopal Singh, deceased, by nationality Rajputs, by occupation zemindars and inhabitants of Sadpur Koila, Pergana Kahlagaon, and Sheik Sabi Buksh, son of Sheik Karim Buksh, deceased, by occupation a zemindar, inhabitant of Anandpur, Pergana Bhagulpur. I have received Rs. 20 out of Rs. 1,260 the fixed price, and have therefore granted this receipt that it may be of service when required."

On the 9th January 1896, a deed of sale of the said property was executed and registered by the said Mussummat Shama in favour of the said defendants. The present suit was instituted by the plaintiff on the 11th January 1896. The plaintiff submitted that prior to the 3rd January 1896, the defendants second party had full knowledge and information of the contract for sale made by the said Mussummat Shama in his favour, and that he gave them notice of the same, and personally warned them against the registration of their *bainanamah* in the presence of the Sub-Registrar. The defendants second party denied all knowledge of the plaintiff's **[470]** alleged prior contract, and they and the defendant first party disputed the genuineness of the document, dated the 27th December 1895.

The Subordinate Judge dismissed the suit, holding that the document (*a*) was inadmissible in evidence for want of registration ; that the registered *bainanamah* of the said defendants second party must take effect against the plaintiff's alleged oral agreement under s. 48 of the Registration Act; and that the plaintiff's whole story was untrue. On appeal, the District Judge held that the document (*a*) was admissible in evidence as a receipt ; that s. 48 of the Registration Act did not apply ; that the plaintiff's story was true, and that notice was given by the plaintiff of his prior contract to the defendants second party at the time of the registration of the *bainanamah*, and undoubtedly before the execution of the deed of sale of the 9th January 1896. The District Judge accordingly gave the plaintiff a decree, directing the defendant first party to execute a deed of sale in his favour within sixty days.

The defendants second party appealed to the High Court.

The Advocate-General (Mr. *J. T. Woodroffe*), Babu *Jogesh Chandra Dey*, *Babu Lal Mohan Das*, and Babu *Lalmohan Ganguli*, for the appellants.

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Sir *Griffith Evans*, Dr. *Rash Behari Ghose* and Babu *Buldeo Narain Singh*, for the respondents.

The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows:—

JUDGMENT.

This is a suit for specific performance of an agreement to sell 28 bighas of land for Rs. 1,200.

The District Judge, reversing the decision of the Subordinate Judge, has found in favour of the plaintiff.

The defendants second party appealed.

The facts as found by the District Judge are (1) that the defendant first party agreed to sell the land to the plaintiff for Rs. 1,200, on the 27th December 1895, and received Rs. 25 and executed a document Ex. (*a*); (2) the defendant first party then agreed to sell the same land to the defendants second party for Rs. 1,260, took Rs. 20 from them and executed a *bainanamah* on the 3rd January 1896; (3) the plaintiff before the registration [471] of this *bainanamah* gave the defendants second party notice of his contract with the defendant first party; (4) notwithstanding this the defendant first party executed and registered a conveyance in favour of the defendants second party on the 9th January 1896.

On these findings of fact the Judge comes to the following legal conclusions: (1) that the document Ex. (*a*) is admissible in evidence as a receipt; (2) that the *bainanamah* does not take effect against Ex. (*a*), as it is not a document relating to immoveable property; (3) that it conveys no title to the defendants second party; and (4) that the deed of the 9th January 1899 is of no avail as executed after notice of the plaintiff's contract with the defendant first party.

We have no doubt that the Judge is right in the first of these findings. The document Ex. (*a*) is clearly admissible in evidence, and supported as it is by the oral evidence it substantiates the defendant first party's agreement to sell the land to the plaintiff. It is not inadmissible for want of registration, as it appears to us to come under s. 17, cl. (*h*), Act III of 1877.

The Judge is in our opinion in error in holding that the *bainanamah* of the 3rd January 1896 does not come within the purview of s. 48 of the Registration Act. We think it cannot properly be said not to be a document relating to immoveable property. But notwithstanding the fact of its registration it will not defeat the plaintiff's right to obtain specific performance of his agreement: (1) because the plaintiff's contract is not merely an oral agreement; it is embodied in a document Ex. (*a*), which is an agreement to sell, but which does not require registration as coming within, not s. 17 (*c*), but s. 17 (*h*) of the Registration Act; and (2) in consequence of the provisions of s. 27 of the Specific Relief Act, cl. (*b*). The title of the defendants second party arose subsequently to the plaintiff's contract, and the defendant second party clearly paid the consideration and took the conveyance of the 9th January 1896 after due notice of the plaintiff's contract had been given them. The *bainanamah* was also probably executed after the [472] defendant second party had had notice of the plaintiff's contract. It is difficult to believe that this was not the case, for the defendants first and second parties were living together, and were evidently acting in collusion all along. But it has been contended that the Judge has not expressly found that the defendants second party had notice of the plaintiff's prior

contract before the execution of the *bainanamah*. They certainly had such notice before its registration. But this is immaterial; for, as pointed out by the learned District Judge, under s. 54 of the Transfer of Property Act, the *bainanamah* gave them no legal right to the land, but only an equitable right, and an equitable right cannot under the provisions of s. 27 of the Specific Relief Act prevail against the plaintiff's prior contract.

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We may add that, in our opinion, the provisions of s. 50 of the Registration Act do not defeat the plaintiff's right to relief, as the defendants' *bainanamah* of the 3rd January 1896 appears to us to be a document of the same nature as the plaintiff's Ex. (*a*), *viz*., a document merely giving a right to obtain another document creating, declaring, assigning, &c., a right, title and interest in immoveable property. That being so, it is not a document of the kind mentioned in cls. (*a*), (*b*), (*c*) or (*d*) of s. 17, or (*a*) or (*b*) of s. 18, but one of the nature referred to in s. 17, cl. (*h*). That this is so is clear from the fact that the defendants first and second parties thought it necessary to execute and exchange the deed of sale of the 9th January 1896, which is the only deed which conveys a legal title in the land to the defendants second party.

For these reasons we affirm the judgment of the District Judge, and dismiss this appeal with costs.

M. N. R. *Appeal dismissed.*

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27 C. 473=4 C.W.N. 569.

[473] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

GIRISH CHANDRA CHOWDHRY ROY AND OTHERS (*Defendants Nos.* 2 *to* 6) *v.* KEDAR CHANDRA ROY AND ANOTHER (*Plaintiffs*).*
[22nd November, 1899.]

Bengal Tenancy Act (*VIII of* 1885), *s.* 22—*Occupancy, non-transferable right of—Effect of purchase of non-transferable right of occupancy by a co-sharer landlord.*

Section 22 of the Bengal Tenancy Act applies only to occupancy-holdings which are transferable. In the case of a non-transferable occupancy-holding, the holding itself, as apart from the right of occupancy, can not be sold so as to give the transferee a right to retain possession of it.

Jawadul Huq v. *Ram Das Saha* (1) explained and distinguished.

[F., 5 Ind. Cas 264 (266); 12 Ind. Cas. 67 (68); 15 Ind. Cas. 524 (525); 25 Ind. Cas. 546=19 C.L.J. 400; **Rel.**, 13 Ind. Cas. 336 (337); **R.**, 17 C. P. L. R. 18 (19); **Doubted**, 13 C.W.N. 937.]

THE plaintiffs, Kedar Chandra Roy and Indramony Gupta, are the owners of a 12 annas share of a *taluk* in the district of Mymensingh. The defendants Nos. 2 to 6 are the owners of a 2 annas share and the defendants Nos. 7 to 10 are the owners of the remaining 2 annas share of that *taluk*. There was a *jote* in the *taluk*, held under occupancy right by one Chidam Mal, the father of defendants Nos. 11 to 14. The defendants Nos. 2 to 6 brought the said holding to sale in execution of a money decree

* Appeal from Appellate Decree No. 565 of 1898, against the decree of Babu Gopal Chunder Bose, Subordinate Judge of Mymensingh, dated the 2nd of December 1897, affirming the decree of Babu Tej Chunder Mukerjee, Munsif of Mymensingh, dated the 4th of December 1896.

(1) 24 C. 143.

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against the said Chidam Mal, and purchased it themselves in 1893. They then let out a portion of the holding to the defendant No. 1, and brought the reminder under cultivation, as they alleged, by *bargadar*, and were in possession by receiving crops therefrom.

The present suit was instituted by the plaintiffs to obtain *khas* possession of their 12 annas share in the land which comprised the *jote* of Chidam Mal jointly with their co-sharer defendants, on the ground that Chidam Mal having abandoned the *jote*, and his occupancy right, which was not transferable, having been extinguished by the auction sale, the right to hold the land in suit in *khas* possession had reverted to the landlords.

The defendants Nos. 2 to 6, amongst other things, contended that, according to local usage, occupancy rights in the place were [474] saleable in execution of a money decree, and that the plaintiffs were not entitled to a decree.

The Munsif found that in that part of the country occupancy rights were not transferable by custom, so that the auction purchase by the contending defendants gave them no special right to take *khas* possession of the whole of the disputed lands, and accordingly decreed the suit.

There was an appeal by the defendants Nos. 2 to 6 to the Subordinate Judge, which was dismissed.

The defendants Nos. 2 to 6 appealed to the High Court.

Baboo *Dwarka Nath Chakravarti*, for the appellants.

Baboos *Upendra Nath Mukerjee* and *Gobind Chunder Dey Roy*, for the respondents.

The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows :—

JUDGMENT.

The facts of this case, so far as it is necessary to state them for the purposes of this appeal, are shortly these : The plaintiffs and the defendants Nos. 2 to 10 were the joint owners of a *taluk* appertaining to which there was a non-transferable occupancy holding belonging to one Chidam Mal. The defendants Nos. 2 to 6 brought to sale and purchased that holding in execution of a money decree against Chidam Mal and took possession of the land. The plaintiffs borught this suit to get joint possession with the defendants of their 12 annas share in the land. The first Court gave them a decree, which has been confirmed by the lower appellate Court.

It is argued on an inference based on s. 22 of the Bengal Tenancy Act and the decision of a Division Bench of this Court in the case of *Jawadul Huq* v. *Ram Das Saha* (1) that the occupancy-right is severable from the tenancy-right and that although the occupancy-right could not be sold, the sale and purchase of the tenancy-right was good, and that the plaintiffs [475] have consequently no right to interfere with the possession of the purchasing defendants.

In this argument we see no force. Section 22 of the Bengal Tenancy Act does not make a non-transferable occupancy holding transferable when the purchaser happens to be one of the proprietors. That section, read in connection with the other sections of the Act, must be taken to refer to occupancy-holdings which are of a transferable character, and the section enacts that when such a holding is transferred to one of the co-proprietors, the occupancy-right in the land so transferred shall cease to exist. The decision to which we have referred merely held that although by the

(1) 24 C. 143.

operation of that section the occupancy-right ceased to exist, there might be a good transfer of the holding. Although under the provisions of s. 22 of the Bengal Tenancy Act an occupancy-right may be severable, it is only severable in cases to which that section applies, and cannot be made severable in all cases. Apart from any special provision of law such as is contained in s. 22 of the Bengal Tenancy Act and is applicable only to the cases referred to in that section, it does not seem possible on any principle to hold that in the case of a non-transferable occupancy-holding the holding can be sold without the right of occupancy, so as to give the transferee a right to retain possession of it.

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The tenant, who was in possession, has left the land. It is now in the possession of the purchasing defendants, and we think that the Subordinate Judge was right in treating the holding as abandoned.

These are the only points which have been argued before us.

The appeal is dismissed with costs.

M. N. R. *Appeal dismissed.*

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27 C. 476=4 C.W.N. 321.

[476] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

HOSAIN ALI KHAN (*Plaintiff*) v. HATI CHARAN SHAW (*Defendant*).* [9th January, 1900.]

Bengal Tenancy Act (*VIII of* 1885), s. 46, *sub-ss.* (6) *and* (9)—*Non-occupancy Raiyat—Enhancement of rent—Fair and equitable rent.*

Sub-section (9) of s. 46 of the Bengal Tenancy Act is not exhaustive. It was not intended that if there was no land of a similar description and with like advantages in the same village as the land in suit, it should be impossible to enhance the rent of a non-occupancy raiyat upon any other ground.

THE plaintiff, Sir Syed Hosain Ali Khan Bahadur Mahabat Jung, G.C.I.E., Nawab Bahadur of Murshidabad, brought a suit against one Hati Charan Shaw, alleging that the defendant held 109 bighas of land on eight years' settlement from 1295 to 1302, B. S., at the annual rent of Rs. 81-12, at the rate of 12 annas per bigha, within the plaintiff's estate No. 649 in the Towji of the Collectorate of Midnapur; that the defendant had made himself liable to ejectment under s. 44 of the Bengal Tenancy Act on the ground of his having failed to pay rent for the year 1302; and that the annual rent of the said *jote* should be properly and justly assessed at Rs. 1,154-8 at Rs. 10, Rs. 7, and Rs. 12-8 per bigha. He accordingly brought the present suit, under the provisions of s. 46 of the Bengal Tenancy Act, for the ejectment of the defendant as a non-occupancy raiyat on the ground of his refusal to execute an agreement for enhanced rent tendered to him under that section. He also claimed rent at the old rate for the year 1302, and prayed for the ejectment of the defendant for his non-payment of that rent.

The defendant alleged, amongst other things, that at the most he might be asked to pay fairly and equitably rent of Rs. 95-6, at the rate of 14 annas per bigha.

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* Appeal from Appellate Decree No. 759 of 1898, against the decree of H. R. H. Coxe, Esq., District Judge of Midnapur, dated the 4th of January 1898, affirming the decree of Babu Prosunno Coomar Ghose, Subordinate Judge of that District, dated the 8th of March 1897.

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It appeared from the pleadings that, according to the plaintiff, [477] the land in suit was a *chur*—reformation in a lake,—and there was no land of similar nature and quality in the village, and that the plaintiff claimed the enhanced rates at one-fourth of the value of the actual present produce of the different portions of the land in dispute.

The Subordinate Judge was of opinion that assessment of rent based on such a principle would be against the directions contained in sub-section (9) of s. 46 of the Bengal Tenancy Act, and accordingly refused to record the evidence which the plaintiff tendered on the point. He accordingly held that the defendant should be liable to pay enhanced rent at 14 annas per bigha from 1303, B. S., and decreed the claim for rent for 1302, B. S., &c., and directed that, unless the decretal sum be paid within three weeks, the defendant should be liable to be ejected.

There was an appeal to the Distict Judge preferred by the plaintiff, and the appeal was dismissed.

The plaintiff appealed to the High Court.

Messrs. *Cotton* and *Buckland* and Moulvie *Serajul Islam*, for the appellant.

Baboo *Bidu Bhuson Ganguli*, for the respondent.

The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows :—

JUDGMENT.

This is a suit brought under the provisions of ch. VI of the Bengal Tenancy Act. The plaintiff's claim is a three-fold one. *First*, he seeks to enhance the rent of the defendant, who is a non-occupancy raiyat; *secondly*, he claims arrears of rent at the old rate; and, *thirdly*, he asks for ejectment of the defendant, if the defendant refuses to pay enhanced rent, or if he fails to pay the arrears of rent within the period that may be fixed by the Court for him to pay them.

The Subordinate Judge has given the plaintiff a decree for arrears of rent at the old rate for the year 1302, and has ordered the defendant to be ejected, if he does not pay within three weeks. And he has further given the plaintiff a decree for rent in the future [478] at the rate of 14 annas per bigha which is 2 annas more than the rate at which the defendant has hitherto been paying.

The plaintiff was not satisfied, however; and appealed to the District Judge, who affirmed the decree of the Court of first instance.

The plaintiff now appeals to this Court; and his contention is that the lower Courts have misunderstood the provisions of sub-section 9 of s. 46 of the Bengal Tenancy Act. They have apparently been under the impression that the provisions of this sub-section are exhaustive, and that when it is therein prescribed that the Court "shall have regard to the rents generally paid by raiyats for land of a similar description and with like advantages in the same village," this means that it must have regard to such rents only; that this is the only way in which a Court can carry out the provisions of sub-s. 6 of s. 46; and that as in this case the plaintiff admits that there is no land in the village of a similar description and with like advantages to those of the subject of the present suit, therefore the defendant't rent cannot be enhanced at all.

We are of opinion that in this respect both the lower Courts have misunderstood the provisions of s. 46 of the Tenancy Act. It is laid down in sub-s. 6 of s. 46 that "if a raiyat refuses to execute the agreement tendered by him under this section, and the landlord thereupon institutes a

suit to eject him, the Court shall determine what rent is fair and equitable for the holding."

Sub-section 6 does not prescribe in what way the Court is to determine what is a fair and equitable rent for the holding, but it only restricts the Court in finding what is a fair and equitable rent in one way, that is to say, by the provisions of sub-s. 9 of s. 46 already cited.

Now, s. 46 nowhere says that, if there be no lands of a similar description and with similar advantages in the same village, the Court is to stay its hand and refuse to carry out the provisions of sub-s. 6. It only prescribes that, if there be such lands, then the Court must regard the rents generally paid by raiyats for them, and we do not think that it was intended that **[479]** if there be no such lands, then it should be impossible to enhance the rent of non-occupancy raiyats in any way.

Under these circumstances we think that the case must go back to the lower appellate Court and to the Court of first instance to receive the evidence which the plaintiff tenders, and which he proposes to give to show what will be a fair and equitable rent for the holding in this case, which, according to the plaintiff, should be calculated at the rate of one-fourth of the value of the actual present produce of the land.

We do not say, and we must not be understood as saying, that such is the proper way to estimate what is a fair and equitable rent to be paid by the defendant. It is for the Court of first instance and of first appeal to determine what is a fair and equitable rent. We can give no instructions or assistance with reference to how they are to determine this rent, because the law is silent on this point. We can only say that in our opinion sub-s. 9 is not exhaustive, and that the provisions of sub-s. 6 must be carried out by them to the best of their ability.

We set aside the decree of the lower appellate Court and remand the case to that Court to be determined in accordance with these instructions. Costs will abide the result.

M. N. R. *Appeal decreed and case remanded.*

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27 C. 479 = 4 C.W.N. 494.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

RAJNARAIN MITTER, RECEIVER TO THE PAIKPARA ESTATE (*Plaintiff*) v. EKADASI BAG (*Defendant*).*
[1st and 6th December, 1899.]

Bengal Tenancy Act (*VIII of* 1885), s. 188—*Joint landlords—Suit for apportionment of rent and for splitting a* jama—*Frame of suit—Parties—Arrears of rent.*

Section 188 of the Bengal Tenancy Act does not prohibit joint landlords from ceasing to be joint, or preclude them from suing for their shares of the rent separately, when they have ceased, or wish to cease, to be joint landlords; provided that the suits are so framed as to free the tenant from all further liability to any one of them.

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* Appeal from Appellate Decree No. 174 of 1898, against the decree of Babu Prasanno Kumar Ghose, Subordinate Judge of Midnapur, dated the 1st of November 1897, modifying the decree of Babu Hem Chunder Mukerjee, Munsif of Tamlukh, dated the 20th of January 1897.

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[480] When, therefore, the plaintiffs, who are joint landlords, have in suits separately instituted by them against the defendant tenant, asked for apportionment of rent and for recovery of rents due on such apportionment, and all the parties interested have been made parties to the suits, there is no reason why the plaintiffs should not have the rent apportioned; and the apportionment may take place in respect both of the arrears alleged to be due and the future rent.

[Expl., 16 C.W.N. 774 = 14 Ind. Cas. 292 (293).]

IN one of these two suits, Rajnarain Mitter, Receiver of the Paikpara Estate, sued one Ekadasi Bag, to recover Rs. 55-14-5 as arrears of rent. He stated that *taluk* Gopalpur and *nij* Gopalpur, &c., recorded as *mahal* No. 2637 in the Towji of the Collectorate of Midnapur, are the zemindaris of Kumar Sarat Chandra Singh and others, the *sebaits* of deity Radha Ballab Jew; and that by a decree made in 1893 by the Calcutta High Court, in suit No. 41 of 1889, all *mal* lands of the said *mahal* were set apart for the service of the said deity, and were in the hands of the plaintiff, as Receiver of the said estate. The plaint then went on to say that—

"5. The defendant was in possession of 45 bighas 4 cottas 9 chittaks 4 gundas of *jote* land in all in Mouzah Gopalpur appertaining to *taluk* Gopalpur at a yearly rent of Rs, 146, 13 annas 18 gundas 1 cowri, besides cess. Formerly the defendant paid rent at the above rate and has been receiving *dakhilas* all along from the plaintiff's agent.

6. That out of the said 45 bighas 4 cottas 9 chittaks 4 gundas of land, 5 bighas 7 cottas 2 chittaks 10 gundas bearing a rent of Rs. 16-6-18 gundas was the *nij jote* of Kumar Sarat Chundra Singh, and as the said *jami jama* became his property by the decision in the said suit, the defendant is liable to pay to the plaintiff a yearly rent of Rs. 131, 7 annas 1 cowri, besides cess in respect of the *mal* land of 39 bighas 17 cottas 6 chittaks 14 gundas mentioned in the schedule below, being the balance of the said land of 45 bighas 4 cottas 9 chittaks 4 gundas. A notice was given to the defendant to pay to the plaintiff the rent of the said land of 39 bighas 17 cottas 6 chittaks 14 gundas separately."

The plaintiff, therefore, prayed that a decree be made against the defendant for the sum still due on account of the rent of the said *mal* land, and "that an order be made declaring that the defendant is in possession of 39 bighas 17 cottas 6 chittaks 14 gundas of *ryoti jote* land appertaining to *mal* land at a rent of Rs. 131-7-0-1 cowri." Kumar Sarat Chandra Singh was made a defendant to the suit.

In the other suit, Kumar Sarat Chandra Singh sued the same [481] defendant in similar terms for rent due on account of the *nij jote*, making Rajnarain Mitter, the said Receiver, a defendant.

In both the suits, the defendant, amongst other things, pleaded that as in each case the plaintiff had split the said *jote* and brought a suit for rent of a portion thereof, such a suit could not legally proceed, and that he would sustain a serious loss, if the suit was thus brought by splitting one *jote*.

The Munsif allowed the defendant's plea; but finding that he admitted some arrears as due on account of his *jama*, he gave a decree for those arrears to the Receiver plaintiff and dismissed the other suit.

On appeal, the Subordinate Judge dismissed both the suits.

Both the plaintiffs appealed to the High Court, and the case came on for hearing on 1st December 1899.

Mr. *O'Kinealy*, Babu *Mohan Chand Mitter* and Babu *Nalini Nath Sen*, for the appellant.

Babu *Lal Mohan Das* and Babu *Sarat Chunder Dutt*, for the respondent.

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Cur. adv. vult.

Dec. 6, 1899. The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows:—

JUDGMENT.

These are two analogous rent suits.

In one the plaintiff is Mr. Mitter, Receiver, appointed by this Court to the Paikpara estate. Ekadasi Bag is the principal defendant, and Sarat Chandra Singh is *pro forma* defendant. In the other, Sarat Chandra Singh is the plaintiff, Ekadasi Bag, the principal, and Mr. Mitter, the *pro forma* defendant.

The facts are that the defendant Ekadasi is a tenant of the Paikpara estate, Mr. Mitter is the Receiver and Kumar Sarat Chandra Singh, a transferee of a share in the estate. Formerly, it is said, Ekadasi held two *jamas*, one of 5 bighas odd, and the rent of which was Rs. 16 odd, and the other of 39 bighas odd, the rent of which was Rs. 131 odd. The *jamas* were consolidated and the defendant paid an annual rent of Rs. 146 odd to the co-sharers [482] jointly. Now, the estate has been partitioned by the High Court, and the *jamas* allotted to the different shares. The *jama* of Rs. 131 has fallen to the share of which Mr. Mitter is the Receiver, while the *jama* of Rs. 16 odd has fallen to the share of which Kumar Sarat Chandra Singh is the transferee.

Mr. Mitter and Kumar Sarat Chandra Singh now bring these two suits after notice to the defendant for arrears of rent due up to Baisakh 1303 and seek to collect from the defendant the rents due to them separately.

The Munsif held that the plaintiffs cannot recover, as there has been no decree for apportionment, but he gave Mr. Mitter a decree for the amount of rent admitted by the defendant to be due to the whole estate.

The Subordinate Judge dismissed both suits entirely, holding "that the suits were not suits for apportionment of rents, but were only for splitting the defendant's *jama* into two for convenience of the plaintiffs."

Mr. *O'Kinealy* for the plaintiffs urges that there is no difference between a suit for apportionment of rent and one for splitting a *jama*; that the plaintiffs are entitled to have the rent apportioned or the *jamas* split, if they make all the parties interested parties to the suits, as has been done in these cases, and consequently that the plaintiffs are entitled to have the suits remanded for trial.

Babu Lal Mohan Das for the respondent maintains that the defendant's rent cannot be apportioned in these suits; that even if this can be done, the plaintiffs are not entitled to an apportionment of the arrears due as the decrees for apportionment, if the plaintiffs obtain them, can only affect the future, and not the past. Finally, he contends that under s. 188, the plaintiffs, until they obtain decrees for apportionment, must collect the rent jointly.

It would appear to us that there is no reason why these suits should be dismissed. The plaintiffs have from the first asked for the apportionment of the defendant's rent.

All parties interested have been made parties to the suits. There [483] is no valid reason that we can see why the plaintiffs should not now have the defendant's rent apportioned.

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Then, we are also of opinion that apportionment may take place of the sum due for arrears, as well as with regard to the future. As Mr. O'Kinealy puts it, the apportionment may take place with regard to the future, as well as of all the defendant's present obligation.

And in the two cases—*Sreenath Chunder Chowdhry* v. *Mohesh Chunder Bundopadhya* (1) and *Ishwar Chunder Dutt* v. *Ram Krishna Dass* (2), it would seem to us that arrears of rent, as well as apportionment of future rent, were sued for.

These cases are no doubt of date anterior to the passing of the Tenancy Act; but s. 188 would seem to us to present no difficulty. It lays down that joint landlords can only sue for the rent collectively or by common agent. But it does not prescribe that the relation of joint landlords is to endure for ever. It does not prohibit joint landlords from ceasing to be joint, or preclude them from suing for their shares of the rent separately when they have ceased, or wish to cease, to be joint landlords. When a defendant is subject to a joint liability, it would without doubt be unjust to allow him to be sued by one of his joint creditors, who could not release him from his liability to his other creditors. But there would seem to us to be no reason why the creditors should not be allowed to sever their mutual relations, and sue their debtor separately for their shares of the debt, provided this be done in such a manner as to free the debtor from all further liability to any of them. This is being done in these suits. Mr. Mitter sues for the share of the rent due to the share of the estate of which he is a Receiver and Kumar Sarat Chandra Singh is a party. If Mr. Mitter gets a decree, Sarat Chandra Singh can never sue the defendant for more than his own share of the rent; for any decree which Mr. Mitter may obtain will bind him as regards the amount of rent decreed, as well as the tenant defendant. *Mutatis mutandis*, the same will **[484]** be the effect of any decree which Kumar Sarat Chandra Singh may obtain in his suit.

For these reasons we decree these appeals and remand the suits to the lower appellate Court, who will remand them to the Court of first instance for trial, and for apportionment of the defendant's rent in respect both of the arrears alleged to be due and the future. This order will carry costs of these appeals.

M. N. R. *Appeals decreed and cases remanded.*

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27 C. 484 = 4 C.W.N. 269.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

SHYAMA CHARAN MITTER (*Judgment-debtor*) *v.* DEBENDRA NATH MUKERJEE (*Decree-holder*).* [15th January, 1900.]

Second appeal—Execution of rent decree valued at less than Rs. 100—*Bengal Tenancy Act (VIII of* 1885*), s.* 153—*Civil Procedure Code (Act XIV of* 1882*), s.* 647.

Where the original suit is a suit for rent valued at less than Rs. 100 and the decree or order made in it does not decide a question relating to title to land or

* Appeal from Appellate Order No. 137 of 1899, against the order of J. Pratt, Esq., District Judge of 24-Pergunnahs, dated the 22nd of February 1899, affirming the order of Babu Charu Chunder Mitter, Munsif of Diamond Harbour, dated the 18th of December 1898.

(1) 1 C. L. R. 453.

(2) 5 C. 902.

some interest in land as between parties having conflicting claims thereto, or a question of a right to enhance or vary the rent of a tenant, or a question of the amount of rent annually payable by a tenant, no second appeal will lie in respect of an order made in execution proceedings relating thereto. 1900 JAN. 15. APPELLATE CIVIL. 27 C. 484 = 4 C.W.N. 269.

[F., 28 C. 116 (117, 118); 16 C.L.J. 96 = 16 Ind. Cas. 975 (976); 18 Ind. Cas. 245; Rel., 10 Ind. Cas. 412 (413); Appr., 30 B. 113 = 7 Bom. L.R. 641 (642); R., 15 C.W.N. 760 = 10 Ind. Cas. 539 (540); 19 C.L.J. 310 = 23 Ind. Cas. 12; 18 C.W.N. 1266 = 20 C.L.J. 341 (347); D., 1 C.L.J. 454 = 9 C.W.N. 725 (N).]

ONE Debendra Nath Mukhapadhya on the 16th July 1894 obtained a decree for arrears of rent against one Shyama Charan Mitter. The amount claimed in the suit for recovery of rent was less than Rs. 100. On the 15th July 1897 the decree-holder applied in the Baruipore Munsif's Court for the execution of the said decree, but it was transferred to the Court of the Munsif of Diamond Harbour on the 27th July 1897. The judgment-debtor objected to the execution of the decree on the ground that it was barred by limitation. The Court of first instance holding that the application of the 15th July 1897 was a step in aid of the execution of the decree, over-ruled the objection. On appeal the learned District Judge confirmed this decision of the first Court. Against this decision the judgment-debtor appealed to the High Court.

[485] Dr. *Asutosh Mookerjee* and Babu *Jnanendro Nath Bose*, for the appellant.

Babu *Umakali Mookerjee*, for the respondent.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of an application for the execution of a decree for arrears of rent passed in a suit for recovery of rent, the amount claimed in the suit being less than Rs. 100.

The judgment-debtor objected to the execution proceeding. His objection was over-ruled by the Munsif, who heard the case in the first instance. There was an appeal preferred against the Munsif's decision by the judgment-debtor, and that appeal has been dismissed by the District Judge. And against the order of the District Judge the present appeal has been preferred by the judgment-debtor.

At the hearing of the appeal a preliminary objection is taken by the learned vakil for the decree-holder respondent, that this appeal is barred by s. 153 of the Bengal Tenancy Act. That section enacts that "an appeal shall not lie from any decree or order passed, whether in the first instance or on appeal in any suit instituted by a landlord for the recovery of rent where" (we refer only to so much of the section as bears upon the present case) "the decree or order is passed by a District Judge, * * * * * * and the amount claimed in the suit does not exceed one hundred rupees * * * * unless * * * * the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto or a question of a right to enhance or vary the rent of a tenant or a question of the amount of rent annually payable by a tenant.

It is admitted by the learned vakil for the appellant that the amount claimed in the suit for the recovery of rent did not exceed Rs. 100; and it is admitted also that the decree or order appealed against has not decided any of the questions referred to in the section—a decision upon which gives an appeal, notwithstanding that the amount claimed does not exceed [486] Rs. 100. But the ground upon which he contends that the appeal

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is not barred is that a case like the present does not come within the language of the section, or in other words, that an order passed in a proceeding in execution of a decree for rent is not a "decree or order passed in any suit instituted by a landlord for the recovery of rent" within the meaning of s. 153. On the other hand, the learned vakil for the respondent contends that such an order does come within the meaning of those words, because, by virtue of the explanation of s. 647 of the Code of Civil Procedure, an application for the execution of a decree is a proceeding in the suit in which the decree was passed.

The decision of the question raised in this case, therefore, resolves itself into the determination of the question, whether the term "suit" in s. 153 of the Bengal Tenancy Act is used in a narrow sense as being terminated by the decree made by the first Court, or in a broad sense as including not only the stages of a suit down to its termination by the decree of the first Court, but also its appellate stage, and also proceedings in execution of the decree made in the suit, the contention on behalf of the appellant being that it is used in the restricted sense, and that on behalf of the respondent being that it is used in its more comprehensive sense.

In determining this question we think that the section itself ought in the first instance to be referred to in order to ascertain if it throws any light upon the question. And referring to the section we find that it evidently uses the term "suit" not in its narrow sense, for it speaks of "any order or decree passed in the first instance or on appeal in any suit;" thereby indicating that a decree or order passed on appeal is a decree or order passed in a suit. Starting with this indication afforded by the section itself that the term "suit" is not used in its narrow sense, have we anything to indicate that it is used nevertheless in a narrow sense so far as to exclude proceedings in execution? We must say that neither the language of the section, nor its aim and intention, so far as we can gather the same from the section, would furnish any ground for imposing such a limitation on the meaning of the term "suit." Then from s. 647 of the Code of Civil Procedure it appears that applications for execution of decrees [487] are proceedings in suits. It was argued for the appellant that *that* section does not say that they are to be regarded as proceedings in the suits in which the decrees were made. If they are not proceedings in the suits in which the decrees are made, it is difficult to see what other suits they are proceedings in. It was suggested that they are proceedings in suits in the sense of the proceedings being themselves treated as suits. We do not consider that view correct.

Then looking to the reason of the thing can we say that there is any reason in favour of the limitation which the learned vakil for the appellant contends for? If s. 153, with the evident object of preventing protracted litigation in cases of small value not affecting any permanent interests, bars an appeal from a decree or order passed in a suit for recovery of rent valued at an amount not exceeding Rs. 100, when such decree does not decide any of the questions referred to in the section, can there be any reason why nevertheless the Legislature should have intended to allow an appeal against an order made in a proceeding for the enforcement of such a decree? We are of opinion that this question must be answered in the negative. There is another argument in favour of the view we take, which is furnished by the rule laid down by this Court, and also the High Court at Allahabad, with reference to a class of cases analogous to the present—we mean cases of orders made in execution of decrees passed in suits of the nature

cognizable by Courts of Small Causes. Such orders have been held to be non-appealable by virtue of the provisions of s. 586 of the present Code of Civil Procedure. We may add that the same view was taken under the old Code of Civil Procedure, when s. 27 of Act XXIII of 1861 was the law on the point. The cases in which the abovementioned rule has been laid down are: *Lala Kandha Pershad* v. *Lala Lal Behary Lal* (1); *Anund Chunder Roy* v. *Sidhy Gopal Misser* (2); and *Din Dayal* v. *Patrakhan*(3). In these cases upon the construction of a provision of the Statute Book expressed in language somewhat similar to that of **[488]** s. 153, it was held that a second appeal was barred not only against the decree made in a suit of the Small Cause Court class, but also against an order made in proceedings taken in execution of such a decree. We may say in this case what Mr. Justice Louis Jackson said in the case of *Anund Chunder Roy* v. *Sidhy Gopal Misser* (2) just referred to, that though we admire the ingenuity which has distinguished the argument of the learned vakil for the appellant, Dr. Ashutosh Mukerjee, we feel no doubt that the view we take is the correct one.

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The result is that the preliminary objection must be allowed to prevail, and this appeal dismissed with costs.

S. C. G. *Appeal dismissed.*

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27 C. 488.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

AMAR CHUNDRA BANERJEE (*one of the Judgment-debtors*) v. GURU PROSUNNO MUKERJEE (*Decree-holder*).* [31st January, 1900.]

Civil Procedure Code (*Act XIV of* 1882), *ss.* 228, 232 *and* 578—*Jurisdiction of a Court where a decree has been transferred for execution to substitute the name of the transferee of the decree—Whether an order passed without jurisdiction can be cured by the provisions of s.* 578 *of the Civil Procedure Code.*

An application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and the Court to which the decree has been transferred has no jurisdiction to entertain it.

Sheo Narain Singh v. *Hurbuns Lall* (4); *Nakoda Ismail* v. *Kassam* (5); and *Kadir Baksh* v. *Ilahi* (6), referred to.

In a case where a decree has been transferred to another Court for execution, and that Court orders the execution to proceed after substitution of the name of the transferee of the decree, the said order is one passed without jurisdiction, and can be set aside on appeal, notwithstanding the provisions of s. 578 of the Civil Procedure Code.

[489] *Sham Lal Pal* v. *Modhu Sudan Sircar* (7), distinguished.

[R., 25 A. 443 (445); 28 M. 466 (472) (F B.) = 15 M.L.J. 116; 1 C.L.J. 315 (318); 12 M.L.J. 24 (33); 11 O.C. 112 (113); 13 C.W.N. 533 = 9 C.L.J. 443 (446).]

THIS appeal arose out of an application for execution of a decree. The decree was originally passed by the Small Cause Court at Sealdah and was afterwards transferred to the Munsif's Court at Alipore for execution. In that Court, execution was allowed to proceed at the

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* Appeal from Order No. 223 of 1899, against the order of F.F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 24th of March 1899, affirming the order of Babu Shoshi Bhushan Chowdhry, Munsif of Alipur, dated the 14th of January 1899.

(1) 25 C. 872. (2) 8 W. R. 112. (3) 18 A. 481. (4) 14 W.R. 65.
(5) 9 B. H.C. 46. (6) 2 A. 283. (7) 22 C. 558.

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instance of one Jogendra Haldar, the assignee of the decree. During the pendency of the said proceeding Jogendra Haldar transferred the decree to one Guru Prosunno Mookerjee, and applications were made both by the transferor and the transferee for allowing the latter to carry on the execution. Thereupon notices were issued upon the judgment-debtors, and they objected to the execution mainly on the ground that the Court to which the decree was transferred for execution, could not entertain the application for execution after substitution of the name of the transferee of the decree. The Court of first instance overruled this objection, and allowed execution to proceed. On appeal to the District Judge the decision of the first Court was confirmed. Against this decision one of the judgment-debtors appealed to the High Court.

Babu *Umakali Mookerjee* and Babu *Nogendra Nath Mitter*, for the appellant.

Babu *Basant Kumar Bose* and Babu *Horendra Narayan Mookerjee*, for the respondent.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows :—

JUDGMENT.

BANERJEE, J.—This appeal arises out of certain proceedings in execution of a decree. The decree was passed by the Small Cause Court at Sealdah, and it was subsequently transferred by that Court for execution to the Munsif's Court at Alipore. After various proceedings taken in the Alipur Munsif's Court, execution was ordered to proceed at the instance of Jogendra Haldar, who was an assignee of the decree. While the proceeding instituted by Jogendra Haldar was going on, the decree was transferred by him to Guru Prosunno Mukerjee, and appplications [490] were made to the Munsif's Court at Alipur by him and Guru Prosunno Mukerjee for allowing the latter to carry on the execution case. Thereupon notice was given to the judgment-debtors; they objected to the decree being enforced by the transferee; but the Court overruled their objection, and having found that the alleged transfer of the decree was true, allowed Guru Prosunno Mukerjee's application. Against this order of the Munsif, Amar Chundra Banerjee, one of the judgment-debtors, appealed to the District Judge, but his appeal has been dismissed, and hence this second appeal.

It is contended by the learned vakil for the appellant, judgment-debtor, that having regard to the provisions of s. 232 of the Code of Civil Procedure, the application for execution of the decree by the transferee, Guru Prosunno Mukerjee, could be entertained only by the Court which passed the decree, and that the Court to which the decree had been transferred for execution had no jurisdiction to entertain it. And in support of this contention the cases of *Sheonarain Singh* v. *Hurbuns Lall* (1); *Nakoda Ismail* v. *Kasam* (2); and *Kadir Bakhsh* v. *Ilahi Bakhsh* (3) are relied upon.

On the other hand it is argued for the respondent that s. 232 is only a permissive provision which does not restrict the operation of s. 228 by which the Court executing a decree sent to it has the same powers in executing such decree as if it had been passed by itself; and that even if an application to the Court, which passed the decree, was a necessary preliminary under s. 232, the order of the Court below made in the absence of such an application involved only an irregularity not affecting the

(1) 14 W. R. 65. (2) 9 B. H. C. 46. (3) 2 A. 283.

merits of the case, and that order ought not to be set aside merely by reason of such irregularity, having regard to the provisions of s. 578 of the Code; and in support of this argument the case of *Sham Lal Pal* v. *Modhusudan Sirkar* (1) is cited. 1900 JAN. 31. APPELLATE CIVIL. 27 C. 488.

The points that arise for determination therefore are:—

First, whether the Munsif's Court at Alipur, to which the [491] decree in question had been transferred for execution, had power to entertain the application of Guru Prosunno Mukerjee, the transferee of the decree, to be allowed to enforce the decree; and

Second, whether, even if that Court had no such power, its order directing execution to proceed could be set aside on appeal, having regard to the provisions of s. 578.

The determination of the first point depends upon the construction of s. 232 of the Code of Civil Procedure. That section runs thus:—"If a decree be transferred by assignment in writing, or by operation of law, from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it, and if that Court thinks fit the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder," and then there are two provisos to the section. Though the section is not worded as clearly as it might have been, yet reading the section as a whole we think its intention is to make an application by a transferee of a decree for its execution entertainable only by the Court which passed the decree. The section clearly shows that an application by a transferee of a decree for leave to execute it is to be granted, not as a matter of course, but only when the Court which passed the decree thinks fit. A discretion being thus left in that Court to allow or not to allow the execution to proceed at the instance of a transferee of the decree, it would follow that no other Court can entertain an application of the transferee. As for the word "may" occurring in the section on which some stress was laid in the argument for the respondent, the option it implies is an option to apply or not to apply, and not an option to apply to the Court which passed the decree or to some other Court. And as for the general provision in s. 228, that the Court executing a decree sent to it for execution has the same powers in executing such decree as if it had been passed by itself, that must be taken subject to the special provision in s. 232 that the power of allowing a transferee of the decree to execute it is to be exercised by the Court which passed it.

The correctness of the view we take will be clear also from [492] the fact that the words "the Court" in s. 208 of Act VIII of 1859, which corresponded to s. 232 of the Civil Procedure Code, 1877, and of the present Code, were held by this Court and by the Bombay High Court, respectively, in the cases of *Sheo Narain Singh* v. *Hurbuns Lall* (2), *Nakoda Ismail* v. *Kassam* (3), to mean the Court which passed the decree, and the qualifying words "which passed the decree" were added to the words "the Court" in s. 232 of the subsequent Code of 1877 and of the present Code. And we may add that the case of *Kadir Bukhsh* v. *Ilahi* (4), which was governed by s. 232 of Act X of 1877, supports the view we take.

It was argued for the respondent that if a Court executing a decree transferred to it for execution be not held empowered to grant an application by a transferee of the decree to execute the decree, especially when such application is not an application to institute execution proceedings for the

(4) 22 C. 558. (2) 14 W. R. 65. (3) 9 B. H. C. 46. (4) 2 A. 283.

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first time, but is one only to carry on the proceedings already instituted by the original decree-holder, great inconvenience might be caused to the transferee. That might be so in some cases; but on the other hand, as has been pointed out in the case of *Sheo Narain Singh* v. *Hurbuns Lall* (1) already referred to above, "it would lead to the greatest difficulties, if in one Court one party was recognized as being the holder of and having the control over a decree, and at the same time in another Court another party was recognized as being in that position."

It remains now to consider the second point, namely, whether the omission of the transferee to apply to the Court which passed the decree can be held to be cured by s. 578 of the Code. In the view we have taken of s. 232, this point also must be decided against the respondent. For when according to that view no Court other than the Court, which passed the decree, can in the exercise of its discretion determine whether a transferee of the decree should be allowed to execute the decree, if any **[493]** other Court determines that matter and allows the transferee to go on with the execution of the decree, it acts without jurisdiction; and as the omission in question affects the jurisdiction of the Court, s. 578 cannot help the respondent.

As for the case of *Sham Lal Pal* v. *Modhusudan Sircar*, (2) that is distinguishable from the present. The question there was as to the meaning and effect of s. 234 of the Civil Procedure Code which provides that an application for executing a decree against the legal representative of a deceased judgment-debtor is to be made to the Court, which passed it, but does not, like s. 232, leave any discretion in that Court to allow execution or not. As execution must, in such cases, issue as a matter of course, an application to the Court which passed the decree may be regarded as mere matter of form, and its omission was therefore held, in the case cited, to be cured by s. 578 of the Code of Civil Procedure.

The result then is that this appeal must be allowed, and the orders of the Courts below set aside with costs.

STEVENS, J.—I entirely concur in the judgment which has just been delivered by my learned colleague so far as it relates to the matters immediately before us, that is, the construction and effect of s. 232 of the Code of Civil Procedure. I desire only to add, as reference has been made to the case of *Sham Lal Pal* v. *Modhusudan Sircar* (2), that I should prefer not to express any opinion as to the construction of s. 234.

S. C. G. *Appeal allowed.*

(1) 14 W. R. 65. (2) 22 C. 558.

27 C. 493.

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APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

DURGA CHARAN SARKAR (*Plaintiff*) v. JOTINDRA MOHAN TAGORE AND OTHERS (*Defendants*).* [14th December, 1899.]

Parties—Joinder of parties—Dismissal of suit for non-joinder of parties—Necessary party—Civil Procedure Code (Act XIV of 1882), ss. 28, 32, 295 and 315—English Judicature Act, 1875, order XVI, Rules 11 and 48.

[494] On a suit brought by the plaintiff for the establishment of his right to and confirmation of possession to certain immoveable property, and for a declaration that it was not liable to attachment and sale in execution of certain decrees held by defendants 1 to 4 against defendants 5 to 7, the defence mainly was that it was not maintainable in the absence of certain persons, who, like the defendants 1 to 4 had obtained decrees against defendants 5 to 7 and had attached the property in dispute, and the plaintiff preferred claims against the said attachments, but they were rejected upon adjudication.

Held, that, inasmuch as the absent decree-holders had applied for attachment and sale of the property in dispute in execution of their decrees and had successfully resisted the claim of the plaintiff, the plaintiff had a right to some relief against them (the absent decree-holders) in respect of the matter involved in the suit, and as their presence was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, the absent decree-holders were necessary parties to it, and the plaintiff not having brought them on the record as defendants the suit was not maintainable.

Mahomed Badsha v. *Nicol, Fleming and others* (1) distinguished.

[**Rel.**, 16 C.L J. 385=17 C.W.N. 835=17 Ind. Cas. 921 ; **R.**, 26 M.L.J. 537=24 Ind. Cas. 369 ; **R. & D.**, 6 C.L.J. 558 (571)=12 C.W.N. 84 ; **D.**, 4 Bur. L.T. 145=12 Ind. Cas. 866.]

THIS appeal arose out of an action brought by the plaintiff for confirmation of possession to certain immoveable property by establishment of his title thereto, and for a declaration that the said property was not liable to attachment and sale in execution of certain decrees. The allegation of the plaintiff was that he had purchased the property in dispute from the defendants Nos. 5 to 7 by a registered *Kobala* executed by them on the 25th October 1891 ; that the defendant No. 1 Maharajah Sir Jotindra Mohun Tagore had a decree for rent in respect of some other properties belonging to the vendors defendants Nos. 5 to 7, and in execution thereof the disputed property was attached ; that on the 13th January 1893 he preferred a claim which was rejected ; that he then brought the present suit in the Court of the Munsif of Faridpore, and prayed for an injunction to stop the sale, but that was disallowed ; that on the 21st February the Munsif returned the plaint to be filed in the proper Court, he having considered the value of the property to be more than Rs, 1,000, and it was filed before the Subordinate Judge on the same date : that in the meantime the property had been sold in execution of the decree of the defendant No. 1 and purchased by defendants Nos. 8 and 9 who were then made parties. **[495]** The defence (for the purposes of this report) mainly was that the suit was not maintainable inasmuch as certain decree-holders were not made parties defendants to the suit. It appeared that the vendors

* Appeal from Appellate Decree No. 482 of 1898, against the decree of B. C. Mitter, Esq., District Judge of Faridpur, dated the 2nd of December 1897, modifying the decree of Babu Mohim Chunder Ghose, Subordinate Judge of that District, dated the 22nd of November 1894.

(1) 4 C. 355.

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(defendants Nos. 5 to 7) had several debts and several creditors. Some of them were satisfied out of the consideration money alleged to have been kept in deposit with the plaintiff. These decree-holders were not concerned in the present suit. But there were other decree-holders, who were satisfied out of the proceeds of the auction sale, brought about by the defendant No. 1 the Maharajah. The claims preferred by the plaintiff against the attachments taken out by the aforesaid decree-holders were rejected on the 4th January 1893. They were not made parties to the present suit. The Court of the first instance dismissed the plaintiff's suit holding that these decree-holders were necessary parties to the suit. On appeal to the District Judge the decision of the first Court was confirmed. Against this decision the plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose* and Babu *Baikunt Nath Dass*, for the appellant.

Babu *Nil Madhub Bose*, Babu *Sharada Churn Mitter*, Moulvi *Serajul Islam and* Babu *Shib Chunder Palit*, for the respondents.

The judgment of the High Court (BANERJEE and STEVENS, JJ.), was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff appellant for establishment of his right to and confirmation of his possession of certain immoveable property and for a declaration that it was not liable to attachment and sale in execution of certain decrees held by defendants Nos. 1 to 4 against defendants Nos. 5 to 7. Subsequently, upon the property in suit being sold in execution of the decree held by defendant No. 1 and purchased at auction by two persons Radha Rani Chowdhurani and Jagut Gowri Chowdhurani, they were added as defendants Nos. 8 and 9. The defence, so far as it is necessary to be considered for the purposes of the present appeal, was that the suit could not proceed in the absence of certain persons, who, like the defendants Nos, 1 to 4, had obtained decrees against defendants Nos. 5 to 7, and had attached the property in dispute, and on attachment at [496] whose instance claims had been preferred by the plaintiff and had been rejected upon adjudication.

The first Court allowed that objection, but it also went into the merits of the case and dismissed the suit as well on the preliminary objection as on the mreits. On appeal the lower appellate Court has affirmed the decree of the first Court without going fully into the merits of the case, it being of opinion that the objection as to defect of parties was fatal to the plaintiff's case.

In second appeal it is contended on behalf of the plaintiff that the Courts below were wrong in holding, that the decree-holders other than those at whose instance the property was brought to sale were necessary parties to the suit. It is argued that, as those other decree-holders did not proceed to bring the property in dispute to sale, no right to any relief existed as against them in respect of the matter of the present suit, that s. 28 of the Code of Civil Procedure therefore by implication shows that they could not have been joined as defendants in the present suit, and if they could not have been joined as defendants their absence could not amount to a defect in the form of the suit. It is also argued that even the decree-holder at whose instance the property in dispute was brought to sale was only a proper but not a necessary party to the suit ; and in support of this argument the case of the *Bank of Hindustan, China and*

Japan v. *Premchand Rai Chand* (1) is cited. It has been further urged that the mere fact of a person having a remote interest in the subject-matter of the suit, would not be a sufficient ground for holding that he is a necessary party; nor would the fact of any of the defendants being entitled to be indemnified by a third party in the event of the suit succeeding make such third party a necessary party to it, and in support of this last contention the case of *Mahomed Badsha* v. *Nicol, Fleming and others*(2), is relied upon. On the other hand it is argued for the respondents that, although the other decree-holders, whose absence from the record has given rise to the objection on the ground of defect of parties, did not actually cause the sale of the property in dispute in execution of their decrees, yet they, like the decree-holder defendant No. 1, applied **[497]** for attachment and sale of the property in execution of their decrees, and successfully resisted the claim of the present plaintiff to the attached property, and they abstained from bringing the property to sale only because the law, s. 295 of the Code of Civil Procedure, entitled them to share in the proceeds realised by the sale brought about by defendant No. 1 rateably with him, and the other decree-holders who had taken out execution against defendants Nos. 5 to 7; and that being so, it is contended, those decree-holders cannot be said to be persons against whom no right to any relief existed in respect of the subject-matter of this suit. It is further argued for the respondents that, as by s. 315 of the Code of Civil Procedure, the auction-purchaser defendant is entitled to a refund of the purchase-money from any person to whom the same may have been paid, and as a part of that money has been paid to the absent decree-holders, he will be prejudiced, if the suit is allowed to proceed in the absence of those decree-holders.

After considering the arguments of both sides we are of opinion that the view taken by the Courts below that the absent decree-holders are necessary parties to this suit is correct. The Code of Civil Procedure does not contain any express provision as to who should be considered necessary parties, and what would be the effect of the omission of a plaintiff to bring on the record all necessary parties. Section 34, however, by implication shows that an objection for want of parties is a valid objection to a suit or proceeding; and ss. 28 and 32 by implication show who are to be deemed necessary parties. Reading ss. 28 and 32 together we think that in order that a party may be considered a necessary party defendant, two conditions must be satisfied, *first*, that there must be a right to some relief against him in respect of the matter involved in the suit; and *second*, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Now let us see whether those conditions are satisfied as regards the absent decree-holders. As they had applied for attachment and sale of the property now in dispute in execution of their decrees, and had successfully resisted the claim of the presnt plaintiff under s. 278 of the **[498]** Code of Civil Procedure, it is clear that the plaintiff, if his suit is well founded, has the right to ask for a declaration as against them that the property in dispute is not liable to sale in execution of their decrees, and that the order disallowing his claim was wrongly made. Indeed, we find that there is a prayer in the present plaint, namely, prayer (K) which is to the effect that the entire *taluk*, that is the property in dispute, may be held and declared as not fit to be attached and sold in execution of the

(1) 5 B.H.C. 83.

(2) 4 C. 355.

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decrees of any of the principal defendants. If there was a right to claim that relief as against the principal defendants there was an equal right to claim the same relief as against the absent decree-holders. The first condition, therefore, is in our opinion, quite satisfied.

Is the second condition also satisfied? We are of opinion that it is. For in order to enable the Court to adjudicate upon and settle effectually and completely all the questions involved in the suit, it is, we think, necessary that all the decree-holders, who had taken out execution against the judgment-debtors and caused attachment of the property now in dispute and who have obtained satisfaction rateably out of the proceeds realized by the sale of that property, under s. 295 of the Code of Civil Procedure, ought to be before the Court. They are all interested in seeing that the question as to the proprietary right in the property in dispute is correctly determined, and they all run the risk, in the event of the present suit succeeding, of being made liable under s. 315 of the Code of Civil Procedure to repay to the auction-purchaser defendant the purchase-money which has been rateably received by them. They are, in our opinion, necessary parties for this double reason. They are interested in the result of the suit, and two of the defendants, namely defendants Nos. 8 and 9, the auction-purchasers are interested in having them before the Court as their absence will certainly cause inconvenience, and may possibly cause injury to them so far as the enforcement of their right to the refund of the purchase-money goes. If this suit succeeds, the auction-purchaser defendants would, under s. 315 of the Code of Civil Procedure, be entitled to receive back the purchase-money from the persons to whom it has been paid; some of those persons are the absent decree-holders; and, if this suit proceeds [499] in their absence, the decree made in it will be no evidence against them. So that the auction-purchasers will be put to the inconvenience of having the matter readjudicated in their presence with the possibility of a different result being arrived at, and with a consequent possible risk of injury to them. It was argued that, if that were so, the same reason might have held good in the case of *Mahomed Badsha* v. *Nicol, Fleming and others* (1); but the Court in that case was of a different opinion. We think that *that* case is clearly distinguishable from the present. There, as here, the defendant, it is true, was entitled to be indemnified by certain other parties; but those other parties in that case, unlike the absent decree-holders in this case, had no interest in the subject-matter of the suit, nor had the plaintiff any right to any relief as against them, whereas in the present suit the plaintiff, as has been said above, has a right to some relief as against the absent decree-holders.

It is argued that our Code of Civil Procedure embodies only rule 11 of order XVI of the rules made under the Judicature Act, but does not incorporate rule 48 of order XVI known as the third party procedure, and that, therefore, the mere fact of some of the parties to the suit being entitled to be indemnified by certain third parties cannot make those third parties necessary parties, nor has the Court any power to make them parties. We are of opinion that this contention is incorrect. The absent decree-holders are not merely parties against whom the auction-purchaser defendants are entitled to claim some indemnity. They are persons who have an interest in this suit, and they are persons against whom a right to relief exists in the plaintiff, if the suit is well-founded. As for the case of the *Bank of Hindustan, China*

(1) 4 C. 355.

and Japan v. *Prem Chand Rai Chand* (1) no doubt it was there held that the decree-holder who brought the property then in dispute to sale was a proper party, but no question was raised in that case as to whether he was a necessary party or not.

We may add that the view we take is in accordance with that expressed in Story's Equity Pleadings, para. 138, where [500] the learned author observes: "In the next place an interest of the absent parties in the subject-matter *ex directo*, which may be injuriously affected, is not indispensable to the operation of the general rule, for, if the defendants actually before the Court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree more extensive and direct, than if the absent parties were before the Court, that of itself will, in many cases, as we shall presently see, furnish a sufficient ground to enforce the rule of making the absent persons parties." In the present case not only are the auction-purchaser defendants likely to be subjected to inconvenience, and possible injury, by reason of the absence of the other decree-holders, but what is more, they themselves have an interest in the subject-matter of the suit.

It was faintly urged that the lower appellate Court was wrong in holding that the absent decree-holders cannot be made parties now as the relief against them is barred by limitation, and the ground upon which the argument was based was that as the decrees of the absent decree-holders have been satisfied, it was unnecessary to bring any suit to have the order made in the claim case against them set aside. But this argument overlooks the fact that the satisfaction of the decree which is made the basis of the contention, is sought to be rendered nugatory by the act of the plaintiff in bringing the present suit.

We are, therefore, of opinion that the Courts below were right in holding that the suit was not maintainable by reason of the plaintiff not having made the absent decree-holders parties to it.

The appeal consequently fails and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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27 C. 501=4 C.W.N. 480.

[501] CRIMINAL REVISION.

Before Mr. Justice Prinsep, Mr. Justice Stevens and Mr. Justice Stanley.

PANDITA *alias* RAHMATULLA PRAMANIK (*Petitioner*) *v.* RAHIMULLA AKUNDO (*Opposite Party*).* [15th January, 1900.]

*Summary trial—Dispute as to possession of land—*Bona fide *belief as to title—Cutting and carrying away crops sown by another—Facts constituting theft—Dishonest intention—Indian Penal Code (Act XLV of* 1860), *ss.* 24 *and* 379—*Code of Criminal Procedure (Act V of* 1898), *ss.* 429 *and* 439.

An accused person alleged and claimed that certain paddy was grown upon his *jote* and that he cut and removed it as a matter of right, and in an assertion of a *bona fide* claim to the land, it was admitted by the complainant, who also claimed the paddy and the land, that there had been a boundary dispute between his landlord and the landlord of the accused. The accused was convicted in a summary trial of the theft of the paddy.

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* Criminal Revision No. 724 of 1899, made against the order passed by Mahammed Abdullah, Deputy Magistrate of Bogra, dated the 9th of September 1899.

(1) 5 B. H. C. 83.

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Held, per PRINSEP, J: That if the complainant's *bargadars* had grown the crops as found and nevertheless the accused cut and carried them off there could be no *bona fide* belief that he was entitled to do so to justify his action in regard to the complainant. With the fact found that possession was with the complainant by the growing by him of the crops cut by the accused, the accused was without justification in thus taking the law into his hands, even if he was entitled to hold the lands, because he was not in actual possession of them. His Lordship refused to interfere.

Per STEVENS, J: The findings of the lower Court taken as a whole amounted to a finding that the accused acted *mala fides*, and the mere fact that he brought some witnesses to speak to his long possession of the land and the cultivation of the croos by him could not be taken as showing that a *bona fide* dispute as to title existed between the complainant and himself. To constitute theft it is sufficient if property is removed against his wish, from the custody of a person who has an apparent title or even a color of right to such property. In the present case the complainant had an apparent title as tenant of the land, together with long possession, and he had on the strength of that apparent title and long possession raised the crops which the accused removed. The application should be dismissed. *Queen-Empress* v. *Gangaram Santram* (1) referred to.

[502] *Per* STANLEY, J., *contra*.—That the evidence as well for the prosecution as for the defence conclusively established that there was a *bona fide* dispute as to the title to the land upon which the paddy was sown. Once this was shown the criminal charge failed. The fact, if it be the fact, that the paddy was sown by the complainant, would not give him the property in the crop if it were sown on the land of the accused. If the land was the land of the accused it was an act of trespass on the part of the complainant to sow it with paddy, and the complainant had no right to complain if the accused resented his act of aggression by cutting and removing the crop.

A dishonest intent is a necessary ingredient in the offence of theft. No such intention has been found on the part of the accused. That the conviction and sentence should be set aside.

IN this case the accused was convicted in a summary trial of theft of paddy under s. 379 of the Penal Code, and sentenced to two months' rigorous imprisonment. It appeared that a longstanding boundary dispute existed between two *zemindars* of adjoining estates and the plot of land on and from which the paddy was cut and removed was claimed by either *zemindar*. The complainant alleged that he was in actual possession of the disputed land, and that the crops which stood on the same were grown by his *bargadars*; that the accused went with a large body of men to the complainant's land and cut the crops which he had raised. The complainant, however, admitted that there had been a boundary dispute between his landlord and the landlord of the accused. The accused alleged and claimed that the paddy in question was grown upon his *jote*, and that it was cut and removed as a matter of right, and in an assertion of a *bona-fide* claim to the land. Upon the case coming up on revision before a Divisional Bench of the High Court the learned Judges differed in their opinion, and the case was referred to a third Judge under s. 439 read with s. 429 of the Code of Criminal Procedure.

Baboo *Sarat Chandra Ray Chowdhry*, for the petitioner. This is a case in which the Criminal Court ought not to have interfered, but should have left the complainant to his civil remedy. The accused alleged that the paddy was grown upon his *jote*, and he cut and removed it as a matter of right and in an assertion of a *bona fide* claim. It is admitted by the complainant that there was a boundary dispute between his landlord and the landlord of the accused. The evidence adduced on both sides establishes that there was a *bona fide* dispute as to the title to

(1) 9 B. 135.

[503] the land upon which the paddy was sown; that being established, the criminal charge must necessarily fail. It also appears from the evidence that the land upon which the paddy was grown was near the boundary. If the land belonged to the accused the complainant had no right to sow paddy upon it, nor has he any right to complain, if the accused cut and removed the crop. To convict the accused of theft it must be found that there was dishonest intention on his part, and there is no such finding in this case.

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The rule I submit should be made absolute.

The following judgments were delivered by PRINSEP, STEVENS and STANLEY, JJ.:—

JUDGMENTS.

PRINSEP, J.—A rule has been granted to consider whether the conviction and sentence passed on the petition in a summary trial for theft should not be set aside. The sole question for consideration is whether the Magistrate has found facts constituting theft, or whether the petitioner is not guilty of that offence because he cut and carried off the crop, under a *bona fide* belief that he was entitled to it, that is to say, whether he acted dishonestly within the terms of s. 24 of the Penal Code.

The Magistrate has found that the "complainant was in actual possession of the disputed land, and that the crops which stood on the same were grown by the *bargadars*," He adds: "And the accused was by no means justified in cutting them away. The mere setting up of a claim to the land which has not been clearly proved by reliable evidence is not sufficient to exonerate him from the liability of theft." I understand from this that the Magistrate has found that the claim is not *bona fide* because he has not proved it to be so by reliable evidence to rebut the finding that the crop was grown by the complainant. I do not understand that he has tried or attempted to try any question of title. He had previously found possession with the complainant. If his *bargadars* had grown the crops as found and nevertheless the accused cut and carried them off there could, in my opinion, be no *bona fide* belief that he was entitled to do so to justify his action in regard to the complaint, the cutting and removing of the crop grown by another, whatever may be the claim in respect of title set up by the accused.

[504] I think that we are bound to discourage such acts which amount to the taking of the law into his own hands by a person, who being out of possession, is bound to establish his title in the proper way, that is, in the Civil Court.

The Magistrate then proceeds thus: "There has apparently been a dispute of boundary between the two *zemindars*. I mean the *zemindar* of the complainant and the accused, and the accused appears to have taken advantage of the same and attempted to dispossess the complainant from the land in the manner alleged by the prosecution." By this I understand that possession being with the complainant the accused has attempted to interfere with it by this boundary dispute. With the fact found that possession was with the complainant by the growing by him of the crops cut by the accused, the accused was without the shadow of a justification in thus taking the law into his hands—even if he was entitled to hold his lands—because he was not in actual possession of them. I would not interfere.

STANLEY, J.—In this case Pandita Pramanik has been convicted in a summary trial by the Deputy Magistrate of Bogra of the theft of paddy

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under s. 379 of the Indian Penal Code, and sentenced to two months' rigorous imprisonment. It appears that a long standing boundary dispute existed between two *zemindars* of adjoining estates, and the plot of land on and from which the paddy was cut and removed was claimed by either *zemindar*. The accused alleged and claimed that the paddy in question was grown upon his *jote* and his case is that it was cut and removed as a matter of right and in assertion of a *bona fide* claim to the land. The complainant admits that there has been a boundary dispute between his landlord and the landlords of the accused, as do also his witnesses. Johar Mamood Pramanik and Bocha Beparis also both depose to their knowledge of the *disputed plots*. For the defence Dhona Pramanik deposed that "the disputed land has been in accused's possession since the time of his forefathers," and that "both the plots belong to accused," and "that accused grew crops on them and reaped them this year." Masiruddin Pramanik deposed that "the disputed paddy and *jote* plots belong to Pandita Pramanik (the accused), and that he saw the accused grow and reap crops of them." To the same effect is **[505]** the evidence of Nozi Akundo. It being clear from the evidence that the land from which the paddy was removed was in dispute between the parties, it appears to me that unless the Deputy Magistrate was satisfied that the claim of the accused was not *bona fide* he ought not to have adjudicated upon the question of title, much less to have convicted the accused. Instead of leaving the complainant to his civil remedy, the Deputy Magistrate investigated the title to the land and had both oral and documentary evidence produced. He appears to consider that in a case like the present one unless a claimant to land can clearly prove his title by reliable evidence a *bona fide* claim will not avail him if he be charged with theft. In his judgment he says: "The mere setting up of a claim to the land *which has not been clearly proved by reliable evidence is not sufficient to exonerate him (the accused) from the liability of theft.*"

In this the learned Deputy Magistrate was in my opinion entirely in error. He has not ventured to find that there was any dishonest intention on the part of the accused in reaping the paddy. A dishonest intent is a necessary ingredient in the offence of theft. The evidence as well for the prosecution as for the defence conclusively, as it appears to me, establishes that there was a *bona fide* dispute as to the title to the land upon which the paddy was sown. Once this was shewn the criminal charge in my opinion failed. The fact, if it be the fact, that the paddy was sown by the complainant would not give him the property in the crop, if it was sown on the land of the accused. If the land was the land of the accused it was an act of trespass on the part of the complainant to sow it with paddy, and the complainant has no right to complain if the accused resented his act of aggression by cutting and removing the crops.

For the foregoing reasons I am of opinion that the conviction and sentence ought to be set aside.

STEVENS, J.—This is an application for revision under s. 439 of the Code of Criminal Procedure. The learned Judges who composed the Court of Revision before which the case came for hearing were equally divided in opinion, and it has therefore been referred to me for disposal in accordance with the provisions of that section read with s. 429 of the Code.

[506] The applicant has been convicted of theft under s. 379 of the Indian Penal Code. The case against him is that taking advantage of a boundary dispute that had arisen between his *zemindars* and the *zemindar*

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of the complainant, he went with a large body of men to the complainant's land and cut the crops which the complainant had raised. The defence was that the land in question was a part of the applicant's holding and that the crops upon it had been raised, not by the complainant, but by the applicant. The Deputy Magistrate who tried the case was satisfied, as he says, by "both oral and documentary evidence" that in fact the land was in the possession of the complainant and that the crops had been raised by his *bargadars*. He held that the applicant was "by no means justified" in cutting the crops and he accordingly convicted him of theft.

The question is whether there is a sufficient finding of dishonest intention on the part of the applicant to support the conviction.

It has been urged before me for the applicant,—and the same view commended itself to one of the learned Judges who originally heard the case—that the Deputy Magistrate has in fact arrogated to himself the functions of a Civil Court and adjudicated upon the question of title much as a Civil Court might have done instead of limiting his decision on that point to the question whether or not the claim set up by the applicant was a *bona fide* claim.

There is one sentence in the judgment, which, if it stood alone, would no doubt go to support this view. The Deputy Magistrate says: "The mere setting up of a claim, which has not been clearly proved by reliable evidence, is not sufficient to exonerate him from the liability of theft." I think, however, that the judgment must be taken as a whole and with reference to the case set up by each party. The complainant's case was one of long possession on his part as a tenant, actual cultivation of the crops on his behelf by his *bargadars*, and removal of those crops by the applicant in force. The case set up by the applicant was long possession by himself as tenant under another person, actual cultivation of the crops and reaping them as a matter of right. It is obvious that of these two cases one must be essentially false, if the other is true. The Deputy Magistrate found the case of the complainant to be true on the evidence, oral and documentary, before him and the view which he took was that [507] the applicant had taken advantage of the fact that a boundary dispute existed between the two sets of *zemindars* under whom the parties respectively claim, in order to make an attempt to dispossess the complainant. It appears to me that these findings, taken as a whole, amount in truth to a finding that the applicant acted *mala fide*, and I do not think that the mere fact that he brought some witnesses to speak to his long possession of the land and the cultivation of the crops by him can be taken as showing that a *bona fide* dispute as to title existed between the complainant and himself. The evidence of the one set of witnesses or of the other must be untrue, and the Deputy Magistrate had to decide which of the two sets was to be believed.

Very high ground has been taken in the argument before me on behalf of the applicant. I understand the learned vakil to have gone so far as to contend that assuming the complainant to have been in long possession of the land and to have raised the crops, yet, if the applicant thought that he himself had any title in the land, he did not commit theft, because the complainant would have no right to sow crops on land which did not belong to him.

In the first place it seems to me that in order to judge of the *bona fides* of the applicant's claim, we must take it as he himself sets it forth, and that it would be going rather far, when it is found to be false as

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regards the possession of the land and the raising of the crops, to assume that it is honest as regards the title. Further I would refer to the case of *Queen-Empress* v. *Gangaram Santram* (1), in which it is laid down that to constitute theft, it is sufficient if property is removed, against his wish, from the custody of a person who has an apparent title or even a colour of right to such property. In the present case the complainant had an apparent title as tenant of the land together with long possession, and he had on the strength of that apparent title and long possession raised the crops which the applicant removed.

On the whole I think that the findings of the Deputy Magistrate are sufficient to sustain the conviction, and that this application should be dismissed.

The application is dismissed accordingly.

D. S. *Rule discharged.*

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27 C. 508 (F.B.) = 4 C.W.N. 333.

[508] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson, Mr. Justice Banerjee, Mr. Justice Hill and Mr. Justice Rampini.

KHEDU MAHTO *(Plaintiff)* v. BUDHUN MAHTO *(Defendant)*.*
[5th January and 1st February, 1900.]

Second Appeal—Suit for arrears of rent—Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879), *ss.* 37, 38, 47, 49, 56, 62, 67, 76, 98, 135, 137, 144 *—Civil Procedure Code (XIV of* 1882), *ss.* 3, 4, 584.

No second appeal lies in a suit for arrears of rent brought under the provisions of the Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879).

The cases of *Ramjan Khan* v. *Raman Chamar* (2) and *Priag Nath Sah Deo* v. *Mura Munda* (3), so far as they held that a second appeal did lie in cases of this nature arising under Bengal Act I of 1879, were wrongly decided.

[**Rel. on,** 13 C.W.N. 815 = 1 Ind. Cas. 670 ; **R.,** 16 Ind. Cas. 904 (906) ; **D.,** 28 C. 532 (534) = 5 C.W.N. 279.]

THIS case was referred to a Full Bench by RAMPINI and WILKINS, JJ., on the 5th January 1900, with the following opinion :—

This is a second appeal in a suit for arrears of rent coming from the District of Hazaribagh, in which the provisions of Act I of 1879, B.C., are prevalent.

A preliminary objection is taken that no second appeal lies, and the case of *Mul Chand Sahu* v. *Hukum Singh* (4) is relied on. In this case it is laid down that in a suit such as the present no second appeal lies. We have referred to the judgment in this case, as also to the judgment of O'Kinealy, J., sitting alone, in review, and dated the 31st August, 1898, and we find that they fully support the report of the case given in 2 Calcutta Weekly Notes, ccxiv.

On the other hand, in the case of *Priag Nath Sah Deo* v. *Mura Munda* (3), it has been held that in such a suit a second [509] appeal

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* Reference to the Full Bench in Appeal from Appellate Decree No. 773 of 1898.

(1) 9 B. 135. (2) 11 C.L.R. 480.
(3) 24 C. 249. (4) 2 C.W.N. ccxiv.

lies. In this case, also one for arrears of rent, it is said : "It was at first objected that no second appeal lay to this Court, but this objection was overruled years ago. We think therefore, that the objection fails." **1900** FEB. 1. — FULL BENCH. — **27 C. 508 (F.B.) = 4 C.W.N. 333.**

The judgment then goes on to deal with the contention of the appellant in that case that the appeal from the Deputy Collector lay to the Deputy Commissioner, and not to the Judicial Commissioner. This plea was overruled and the appeal was dismissed.

We can find no other express authority for the view taken in this case that a second appeal lies to the High Court in such cases.

The case of *Ramjan Khan* v. *Raman Chamar* (1), which has been cited before us, is a suit not for arrears of rent, but for ejectment. It is, however, a suit under Act I of 1879, B. C., and in this case it was held that an appeal, that is, a second appeal, lay to the High Court. The decision in this case proceeded on the ground that an appeal in such a suit was not barred by s. 137 of the Act. But it seems to have been overlooked by the learned Judges, who decided that case, that there is no provision in the Act expressly giving a second appeal from the decision in appeal of the Deputy Commissioner or Judicial Commissioner in cases under the Act in which an appeal lies to them. In the case of *Mul Chand Sahu* v. *Hukum Singh* (2), or rather in the judgment of O'Kinealy, J., in review in that case, it has been pointed out that the provisions of s. 584 of the Civil Procedure Code, do not give a right of second appeal in cases under Act I of 1879, B. C., because the Act is a complete Code in itself and the provisions of the Civil Procedure Code are therefore not applicable to cases arising under it. There, therefore, appears to be a direct conflict of rulings between the cases of *Mul Chand Sahu* v. *Hukum Singh* (2) on the one hand, and those of *Ramjan Khan* v. *Raman Chamar* (1) and *Priag Nath Sah Deo* v. *Mura Munda* (3) on the other. We are of opinion that for the reasons given in the case of *Mul Chand Sahu* v. *Hukum Singh* (2) the decision in that case is correct, and **[510]** that the decisions in the other cases referred to are erroneous. We, therefore, refer this appeal to a Full Bench, and the questions we would propound for their decision are :—

First.—Whether a second appeal lies in this case?

Second.—Whether the cases of *Ramjan Khan* v. *Raman Chamar* (1) and *Priag Nath Sah Deo* v. *Mura Munda* (3), so far as they are authorities for holding that a second appeal lies to this Court in cases arising under Act I of 1879, B. C., have been rightly decided.

Babu *Saroda Charan Mitra*, for the appellant.

Babu *Jogesh Chandra De*, for the respondent.

Cur. adv. vult.

OPINIONS.

FEB. 1, 1900. MACLEAN, C. J.—It is, I think, reasonably clear that the question referred to us ought to be, and must be, answered in the negative. It is urged by the appellant that a second appeal lies under s. 584 of the Code of Civil Procedure. It is true an appeal lies under that section "unless otherwise provided by this Code or by any other law," and by s. 4 of the same Code nothing contained in that Code shall be deemed to affect "any law heretofore or hereafter passed under the Indian Councils Act, 1861, by a Governor or a Lieut.-Governor in Council, prescribing a special procedure for suits between landholders and their

(1) 11 C.L.R. 480. (2) 2 C.W.N. ccxiv. (3) 24 C. 249.

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tenants." The Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879) is concededly covered by s. 4 of the Code, and the question we have to decide is whether, upon the construction of that Act, a second appeal lies. The sections, upon which the question turns, are ss. 37 and 144.

Section 37 provides that "all suits for arrears of rent," and this was a suit for arrears of rent, "shall be cognizable by the Deputy Commissioners, and shall be instituted and tried under the [511] provisions of this Act and shall not be cognizable in any other Court, except in the way of appeal as provided in this Act."

This language is clear and precise, and no question can properly arise as to its construction. We must then ascertain what is the provision for appeal in the Act? This takes us at once to s. 144.

Section 144 runs as follows: "In all suits other than those in which, when tried and decided by a Deputy Commissioner, the judgment of the Deputy Commissioner is declared to be final," which is a case coming under s. 137, "or when tried and decided by a Deputy Collector an appeal is allowed to the Deputy Commissioner, an appeal from the judgment of the Deputy Commissioner or Deputy Collector shall lie to the Judicial Commissioner of the Division, unless the amount or value in dispute exceed five thousand rupees, in which case the appeal shall lie to the High Court."

This language indicates with sufficient clearness to what tribunal the appeal is to lie. There is no suggestion of any appeal to this Court, save in cases when the amount or value in dispute is over Rs. 5,000. When the Act specially allows an appeal in a certain class of case to the High Court the inference is irresistible that it was only in that class of case that such an appeal was to lie: *expressio unius est exclusio alterius*. Reading ss. 37 and 144 together, and no difficulty of construction arises, it is to my mind perfectly clear that no appeal to the High Court, save in the stipulated case, was intended or provided for. And I may add that when the Code of Civil Procedure was intended to apply, the Act so expressly states. There is nothing about s. 584 applying.

This really disposes of the question.

We have, however, been referred to three or four cases, in which it is alleged that a different view has been taken. In a recent but unreported case, however, decided in May 1898, the case of *Mul Chand Sahu* v. *Hukum Singh* (1) it was held, on review, that there was no second appeal, nor do I think the authorities would justify us in saying, as the appellant suggests, that a practice has grown up of allowing an appeal to this Court [512] in these cases. How far such a practice would be sustainable if it contravened an Act of the Legislature is open to grave doubt. But be that as it may, in none of these cases is any reference made to the provisions of s. 37 of Bengal Act I of 1879; and I do not think I am doing any injustice to the learned Judges who decided those cases in saying that except, perhaps, in the case of *Ramjan Khan* v. *Raman Chamar* (2), which was a different case from the present, the point we have now to decide was not seriously brought to their attention.

In my opinion a second appeal does not lie, and the authorities referred to in the second question submitted to us, so far as they are authorities for holding that a second appeal does lie, must be taken to have been wrongly decided.

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(1) Appeal from Appellate Decree No. 194 of 1897. (2) 11 C.L.R. 480.

The appeal must be dismissed with costs here, and in the referring Court. 1900 FEB. 1.

MACPHERSON, J.—I am of the same opinion. It is conceded that a second appeal will not lie to this Court unless the provisions of s. 584 of the Code of Civil Procedure are applicable to the case. But the provisions of s. 4 of that Code seem to me to bar the application of s. 584. It cannot, I think, be said, having regard to the provisions of ss. 37, 135, 137 and 144 of Bengal Act I of 1879, that that Act does not prescribe a special procedure as regards appeals in suits between landlords and tenants in the Chota Nagpore District. I therefore agree in thinking that no second appeal lies in this case.

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BANERJEE, J.—I am of the same opinion. The only provision of the law under which a second appeal could in this case lie would be s. 584 of the Code of Civil Procedure. But that provision must be taken subject to the limitation contained in the section itself, which is in these words, namely, "unless when otherwise provided by this Code, or by any other law," and subject also to s. 4 of the Code, which enacts that nothing contained in the Code except as provided in the second paragraph of s. 3 "shall be deemed to affect any law passed under the Indian Contract Act, 1861, by a Lieutenant-Governor in Council," I am quoting only so much of the provision as bears upon this case, [513] "prescribing a special procedure for suits between landholders and their tenants or agents." The question then is reduced to this, namely, whether there is any special procedure prescribed by Bengal Act I of 1879 for suits between landlords and their tenants. And a special procedure, we find, is prescribed by that Act for suits between landlords and their tenants. It is argued that the effect of s. 4 of the Code of Civil Procedure, is to exclude only that portion of the Code which affects any law relating to procedure prescribed in Bengal Act I of 1879; and that as this last-mentioned Act makes no provision for a second appeal, the application of s. 584 of the Code will not affect any procedure prescribed in that Act.

But is that so? As has been pointed out in the judgment just delivered by the learned Chief Justice, if s. 144 of Bengal Act I of 1879 stood alone, there might have been some ground for that contention: but that section, read with the concluding part of s. 37 of the Act, makes it clear that if s. 584 of the Code of Civil Procedure is to have application to this case, it will, to that extent, affect the provisions of s. 37.

HILL, J.—I wish only to say that upon reconsideration of this question. I am clearly of opinion that no second appeal lies in a case of this kind. I was a party to the decision in the case of *Priag Nath Sah Deo* v. *Mura Munda* (1), but the view taken in that case proceeded almost entirely upon what was conceived to be an established course of practice supported by a decision in an unreported case decided by Mr. Justice Tottenham and Mr. Justice Agnew in May 1885, in second appeals Nos. 621 to 625 of 1884. That case, however, does not now appear to me on a reconsideration of the question and after hearing what has been addressed to us to-day, to have been correctly decided. I entirely agree with what has fallen from the learned Chief Justice and Mr. Justice Macpherson as to the construction of Bengal Act I of 1879 and the effect upon the question now before us of s. 4 of the Code of Civil Procedure.

RAMPINI, J.—I also consider that no second appeal lies in this case. I would only add to what has been said by the learned [514] Chief Justice

(1) 24 C. 249.

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and my learned brothers that Bengal Act I of 1879 seems to me to contain internal evidence that the provisions of the Code of Civil Procedure are not applicable to cases arising under that Act, and that therefore s. 584 of the Code of Civil Procedure does not apply. I would refer to ss. 47, 49 to 56 and 62 to 67 of the Act which lay down certain procedure for the trial of cases arising under the Act. These sections would be superfluous if the provisions of the Code of Civil Procedure applied in their entirety to cases arising under Bengal Act I of 1879.

I would also refer to ss. 38, 76 and 98 of the Act, which make certain provisions of the Code of Civil Procedure expressly applicable. These would be absolutely unnecessary if the provisions of the whole Code applied to cases under this Act. And I may also in support of this view point to the title of the Act which is described as an "Act to amend the *procedure* in suits between landlords and tenants in Chota Nagpore." Upon these grounds I am clearly of opinion that the provisions of the Code of Civil Procedure do not apply to cases under Bengal Act I of 1879.

Moreover, as has already been pointed out by several of my learned brothers, s. 4 of the Code of Civil Procedure expressly excludes the Code from applying to cases between landholders and their tenants. For these reasons I think that no second appeal lies in this case, and that the cases of *Ramjan Khan* v. *Raman Chamar* (1) and of *Priag Nath Sah Deo* v. *Mura Munda* (2), so far as they hold that a second appeal lies in cases of this nature arising under Bengal Act I of 1879, have not been rightly decided.

M. N. R. *Appeal dismissed.*

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27 C. 515 (P.C.) = 27 I.A. 39 = 2 Bom. L. R. 558 = 7 Sar. P.C.J. 653.

[515] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Morris, Davey, and Robertson and Sir Richard Couch.

[*On appeal from the Court of the Judicial Commissioner, Central Provinces.*]

REWA PRASAD SUKAL (*Defendant*) *v.* DEO DUTT RAM SUKAL (*Plaintiff*). [14th November and 9th December, 1899.]

Joint family estate, Succession to—Title of member by survivorship—Partition not established by award and record at settlement of widow's estate for life—Land Revenue Act, C. P. (XVIII of 1881), *s.* 87.

Where a Hindu and his widow had successively held the estate in suit as joint-family estate in coparcenary with the appellant or his predecessor—

Held, that the appellant succeeded at the widow's death.

Though the widow was recorded under an award by the Collector in the settlement records as owner of an 8-anna share of the estate for her life-time, that did not operate a separation in title or alter its devolution. Section 87 of the Land Revenue Act, Central Provinces (XVIII of 1881) did not affect the appellant's claim, for the award related solely to the widow's interest.

[Appl., 13 C.P.L.R. 81 (90); **Appr.**, 16 C.P.L.R. 3 (6); **R.**, 11 O.C. 381 (394).]

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(1) 11 C.L.R. 480.

(2) 24 C. 249.

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27 I.A. 39=2
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Sar. P.C.J.
653.

APPEAL from decree (23rd February 1894) of the Judicial Commissioner, affirming, on second appeal, a decree (3rd July 1893) of the Judicial Assistant Commissioner, affirming a decree (26th April 1892) of the Civil Judge, Jubbulpur.

The plaintiff (now deceased and represented by his heirs, who were minors, through their mother and guardian) claimed, on the 21st October 1892, the possession of ancestral estate, consisting of shares in villages in the Sehora tahsil. He alleged a right thereto by inheritance, on the death, in 1889, of Massumat Nanhi Bahu, widow of his cousin Sita Ram, the last male holder of the property, who died in 1849, and who was succeeded by the widow for her life estate. He also alleged that Sita Ram, and the parties to this suit, belonged to a divided Hindu family, and that, as shown in the table set forth in the [516] plaint, he the claimant was nearer in degree of relationship to the deceased than the defendant. The table was:—

Ujiar Ram.

Guman Ram.	Manbodhram.	Murlidher.
Partab Ram.	Deo Dutt Ram Sukal (Plaintiff).	Sita Ram, died 1849. Leaving Widow Nanhi Bahu, died 1889.
Madho Prasad.		
Rewa Prasad Sukal (Defendant, Appellant).		

The defence was that the branch of the family to which the defendant belonged, *viz.*, that of Partab Ram, had remained joint in estate with Sita Ram, and on his death with his widow. The claimant's share in the family estate had been divided off to him many years before. On the death of Sita Ram his share had been awarded to his widow at settlement by consent for her life only; on her death the defendant's title accrued by survivorship.

The issues raised the principal questions (1) whether the disputed share had remained joint estate as stated, or was separate; and (2) what was the effect of the award made at the settlement of 1863, and the entry in the record; this latter question being taken in connection with s. 87 of the Central Provinces Land Revenue Act, XVIII of 1881.

On this appeal the question related only to the second of the above questions, and to whether or not the share claimed was to be dealt with as undivided family estate in regard to it.

The Civil Judge found that the share was undivided estate in the hands of Sita Ram, but disposed of the claim in regard to the estate taken by the widow for her life. His decree was for the plaintiff.

The Judicial Assistant Commissioner on appeal affirmed the finding that the share was undivided estate when in the possession of Sita Ram and his widow. But he was of opinion that the settlement award of 1863, at the time when distinct proprietary rights were for the first time conferred, created a widow's separate estate; that the inheritance would in regard to this belong to her husband's heirs, and not pass by survivorship. He therefore dismissed the appeal.

[517] On second appeal, the Judicial Commissioner, bound as he was by the conclusive finding which was in fact that Sita Ram and his widow lived joint in estate with the line of Partab, nevertheless decreed the

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claim. He held that in virtue of the proceedings in the revenue department in 1863, and by the effect of s. 87 above mentioned, a new estate had been created in favour of the widow, and that this had descended to the nearest collateral, who was entitled as the reversionary heir on the widow's death. According to this view the plaintiff was entitled, and the appeal was dismissed. From this decision the defendant now appealed.

Mr. *J. D. Mayne*, for the appellant.—The findings of fact, by the original Court and the Court of first appeal, were conclusive in favour of the defendant that the branch of the family to which he belonged had continued to have a right in the joint estate with Sita Ram and after his death with his widow, as members of an undivided Hindu family. Neither the award at settlement, nor the settlement record in favour of the widow, that she had an estate for life, had any operation in the way of partition, nor did they alter the status of the family, or affect the devolution of the share. The Judicial Commissioner's judgment erred in concluding that the question of inheritance was governed by the title and possession of the widow for life under the award of 1863, taken in connection with s. 87 of Act XVIII of 1881. The mere fact of an arrangement having been made that certain shares in villages, those shares having belonged to her husband as his share in joint family property should be her estate for life, would not be a holding by her inconsistent with the family being still undivided in estate. Section 87 did not relate to a case such as this, but, by its own terms, had a different application, as the question of the reversion and of what should become of it, had never been under the "consideration of the Settlement Officer." Reference was made to *Munnal Chaudhri* v. *Gajraj Singh* (1). On this appeal it could not be disputed that the appellant and Sita Ram were joint in estate, and that after his death this appellant continued so long as she lived to be a member of a joint family holding the **[518]** property in question as part of the joint estate. And there was nothing in the Revenue Proceedings in 1863, or in Act XVIII of 1881, to annul the rights of survivorship which accrued to the appellant.

The respondent did not appear.

Cur. adv. vult.

JUDGMENT.

DEC. 9TH. The judgment of their Lordships was delivered by

LORD ROBERTSON.—This appeal was heard *ex parte*; but the disputed questions are not complicated and are ultimately confined to a narrow issue by findings in fact which bind this Board. On that issue the grounds of the judgments appealed against are explained with sufficient fulness to allow of their validity being tested with some certainty.

The dispute arose on the death of Nanhi Bahu, widow of Sita Ram, in 1889. From 1863 her name had stood, and it stood at her death, recorded, in the Settlement Record as owner, for her lifetime, of eight-anna shares of the zemindari of certain villages, which had been possessed by her husband Sita Ram. The present dispute relates to those shares. The primary theory of the case of the plaintiff (the original respondent in this appeal) was that Sita Ram's estate was divided estate; and, if this had been the fact, the plaintiff, as his nearest heir, would admittedly prevail. The

(1) 17 C. 246.

defendant (now the appellant) on the other hand, maintained, and he has proved, that the estate of Sita Ram was undivided estate enjoyed by Sita Ram jointly with those from whom the appellant derives. There had, it is true, been a partition, in 1824, but this was only between the branch of the family now represented by the plaintiff on the one hand and the rest of the family on the other; the plaintiff's branch dropped out of the community, but the community remained. The findings of the Judicial Assistant Commissioner, Jubbulpore, which are conclusive of the facts in the case, expressly assert that Sita Ram was at his death in shamlat with Partab Singh, who is now represented by the appellant; and carrying the matter a step further and to the latest date with which this suit is concerned, he finds that Nanhi Bahu was at her death in shamlat with the appellant.

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Dislodged by these findings from his original position, the [519] plaintiff relied on the terms of the award of the Deputy Collector in 1863, by which Nanhi Bahu's name was put on the Record; and the Judges in the Courts below have held that that award had the effect of making the shares enjoyed by Nanhi Bahu separate estate to which her husband's heir must succeed. This result is supposed to be brought about by the 87th section of the Central Provinces Land Revenue Act, XVIII of 1881.

Before examining the statute and the award itself, it is well to realize the antecedent facts which are held to be thus affected by them. In 1863 when the proceedings were taken which resulted in the award, the parties to them belonged to an undivided family and the estate was undivided estate. The death of Sita Ram necessitated some mutation of names for the purpose of revenue; it did not necessitate a partition. His widow's right was to maintenance, but the satisfaction of that right by the assigning to her the enjoyment for her lifetime of a share of the estate is not an unnatural or unaccustomed mode of dealing with property that is undivided and is intended to remain undivided. This is pointed out with clearness and emphasis by the Judicial Assistant Commissioner. "This circumstance," he says, speaking of the mutation of names, "does not seem to me to be of the slightest importance in deciding this question in view of the well-known practice of members of an undivided family in this part of the country of recording proprietary rights in villages in the shares to which each member of the family would be entitled, if he separated and at the death of each member continuing to enter his share in the name of that member's heirs although they still continued in shamlat." This view of the matter does not require modification even where, as in the present case, the right recorded is one of zemindari, while the original interest was stated to be a patti right.

The next question is, what is the effect of the 87th section of the Land Revenue Act? What the section says is this: It declares in regard to awards granted before its date (such as that before their Lordships) that every claim shall be barred which, after consideration, has been expressly decided to be invalid or inferior to the claims of the person in whose favour the award is made. This provision is clear and needs no explanation. In [520] order to be barred, a claim must have been considered,—that is made, or tabled as the subject of consideration, and expressly decided.

It has now to be seen what was proposed to the Collector for his consideration and what was done by him in relation to the estate now in dispute. The mover in the application to the Collector was Partab Singh,

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whose rights are now in the appellant and whose acts are therefore binding on the appellant. Pertab Singh proposed and the Collector ordered *inter alia* that eight anna shares should be awarded to Nanhi Bahu "for her lifetime." He did not propose, and therefore the Collector had no occasion to consider any thing as to the reversion of those shares after the death of Nanhi Bahu. In particular, the Collector did not consider, because he had no occasion to consider, the appellant's right to possession after Nanhi Bahu's death. Accordingly, viewing the question for the moment apart from the statute, the award does not touch the present dispute.

When the 87th section is fairly examined, it is apparent that while it gives to such awards the effect of judicial decrees it ascribes to them no adventitious force which would not belong to a decree pronounced *in pari materia*. To be barred by such an award, a claim must have been decided by the officer making the award to be invalid or inferior to the claim of the person in whose favour it is made. The claim of Partab Singh or of any one else to the reversion did not enter the question whether Nanhi Babu should have the estate for her lifetime; she being the person in whose favour for her lifetime the only award of those eight annas was made, the claim of no reversioner had any relation to hers, whether of inferiority or invalidity.

The claim which is brought under consideration by the present appellant was therefore not "expressly decided after consideration" and is not barred by s. 87. The result is that the law governing the question is the ordinary Hindu law, applying to undivided estates; and that law supports the appellant's claim.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed against ought to be reversed, and that the respondents ought to pay the costs in all three Courts and to repay costs that may already have been paid them or the original [521] plaintiff by the appellant. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

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PRIVY COUNCIL.

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PRESENT:

The Lord Chancellor, Lords Hobhouse, Morris, Davey, and Robertson, and Sir Richard Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

SHAMA CHARN KUNDU (*Appellant*) *v.* KHETTROMONI DASI (*Respondent*).
[9th November and 9th December, 1899.]

Probate—Evidence.

Probate is rightly granted where the Judge believes the witnesses who speak to the execution of the will and the disposing mind of the testator.

The rule in *Tyrrell* v. *Painton* (1) requiring proof that the testator actually knew and approved the contents of the will does not apply unless surrounding circumstances excite suspicion.

[R., 39 C. 245 (261)=16 C.W.N. 265=13 Ind. Cas. 577 (591); 7 Bom.L.R. 92 (94); 7 Bom.L.R. 175 (178); 13 Ind. Cas. 433=70 P.L.R. 1912=78 P.W.R. 1912.]

APPEAL from a decree (29th July 1895) of the High Court, reversing a decree (25th June 1894) of the District Court of Howrah.

The appellant petitioned the District Court on the 20th January 1893, for probate under Act V of 1881, of the will of the late Modhu Sudan Kundu, who died at Howrah on the 9th October 1892, at the river side. The petitioner was said to be his adopted son. The latter and three others were appointed executors. The deceased had no natural son, but left a widow and two daughters. Also two nephews survived him, a third having died shortly before the testator. On the 4th October he had executed a will that differed but little from that now in question.

The widow Nistarini Dasi opposed the grant of probate at first, entering a caveat. But she afterwards withdrew her opposition. Thereupon one of the daughters Khettromoni Dasi, now respondent, filed objection to the grant of probate, asking to be made a party. This was rejected and an order was made as in a non-contentious case for probate to issue.

On an application by Khettromoni to the High Court, this order was set aside, it being held that this fell within their [522] authority under s. 622, Civil Procedure. The case was sent back to be tried as a contentious one. The judgment is reported in *Khettromoni Dasi* v. *Shama Charn Kundu* (2).

The following questions were then tried by a District Judge who had succeeded the one whose order had been set aside: Whether the deceased executed the will propounded, and whether at the time he was of sound and disposing mind.

This Judge found that Modhu Sudan, though in a very weak state. knew full well what he was doing. The instructions were his own, not communicated or suggested from without. The provisions of the will gave no indications other than that they were drawn up by a man in full possession of his senses. The issue of probate to Shama Charn of the will propounded, except of the last paragraph, was therefore granted. The reason for the exception of the last paragraph appears from what is stated in their Lordships' judgment. The paragraph mentioned Bhut Nath as

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(1) L.R. (1894) P. 151. (2) 21 C. 539.

1899 DEC. 9. dead, giving the share to be dealt with as the testator wished in case he should die, being unaware of his death.

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On Khettromoni's appeal to the High Court, a Division Bench (Petheram, C. J. and Beverley, J.) reversed the decision of the District Judge. In their judgment they expressed themselves unable to find that the deceased, when at the ghat where he died, was in such a state of mind as to have been able either to have dictated the will, or to have given a conscious assent to any of its provisions, although it might have been that he was not in a wholly unconscious state.

Having these doubts, they said, *in regard* to the evidence required to establish a will in such a case: "The most recent case on the subject that has been brought to our notice is that of *Tyrrell* v. *Painton* (1), in which Lindley, L. J., remarked as follows:—

"'In *Barry* v. *Batlin* (2) Parke, B., delivering the opinion of the Judicial Committee, said: 'The rules of law, [523] according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two. The first, that the *onus probandi* lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.' The same principle was laid down and acted upon in *Fulton* v. *Andrew* (3) and *Brown* v. *Fisher* (4). The rule in *Barry* v. *Batlin*, *Fulton* v. *Andrew* and *Brown* v. *Fisher* is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and whenever such circumstances exist and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document; and it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."

The Judges continuing said:—"In the present case, the question whether or not the petitioner Shama Charn Kundu benefits largely by the will, depends on whether or not he is the legally adopted son of the testator, an allegation which is disputed and which has not yet been judicially decided. But putting that question aside, there are undoubtedly circumstances in this case which excite the suspicion of the Court, and following the principle laid down in the case first cited, we think it was for the [524] petitioner to remove that suspicion and that because the petitioner had given formal evidence of the execution, the burden was not shifted to the object or to prove mental or physical incapacity. The facts alleged in this case are that the testator died of cholera on the day on which he is said to have executed this will, after five days' illness of that disease;

(1) L. R. (1894) P. 151.
(2) 2 Moore's P. C. 480.
(3) (1875) L. R. 7 H. L. 448.
(4) (1890) 63 L. T. 465.

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that at least three days before, his life had been despaired of by his medical advisers, and that two days before he had been carried down to the bank of the river as being in a moribund condition; that nevertheless, he on the Sunday morning, without any draft or any assistance, dictated the will set up, a lengthy and abstruse document requiring no ordinary mental effort; that the discrepancy between the second and ninth paragraphs of the will present a difficulty which has not been satisfactorily explained. All these circumstances, we think, do create an amount of grave suspicion which it was the duty of the petitioner to remove, and which, in our opinion, he has not succeeded in removing."

The decision of the District Judge was reversed and probate refused.

The promovent appealed.

November 9th. Mr. *J. D. Mayne*, for the appellant. The High Court has had no sufficient ground for reversing the order that probate should issue. The question, when the evidence had been given on both sides, was whether the will was the genuine will of the deceased, not so much in regard to where burden of proof had been as a question of the weight of the evidence taken altogether. That evidence was, in a great degree, the testimony of witnesses, but included inference from probabilities, and these were in favour of the promovent's case. He referred to the fact of the will of the 4th October having been executed substantially to the same effect as the will in dispute. If Shama Charn was the adopted son of the deceased, a fact which had not been effectively contested, the will would have been contrary to his interest, as he would have inherited the whole estate instead of receiving legacies among other persons; and, moreover, it was difficult to see what object could have been attained by the fabrication of a will nearly identical in terms with the former one.

[525] Mr. *C. W. Arathoon*, for the respondent, contended that the judgment of the High Court refusing probate was right. His argument, reviewing the evidence, was that the appellant had failed to prove the execution of the will by the testator with a disposing and competent mind; his extreme state of illness being considered, and the discrepancies in the testimony of the witnesses. Whether Shama Charn had been adopted or not had not been tried as a question in issue; his adoption had been denied and was far from having been established.

Mr. *J. D. Mayne* was not heard in reply.

Cur. adv. vult.

JUDGMENT.

DEC. 9th. Their Lordships' judgment was delivered by—

SIR RICHARD COUCH.—The principal question in this appeal is, whether probate of the will of Modhu Sudan Kundu, who died on the 9th October 1892, ought to be granted. The appellant was the applicant for the probate, and in his petition for it, presented to the District Judge on the 20th January 1893, he stated that he was the adopted son of Modhu Sudan and one of the executors mentioned in the will. He also stated that another will had been executed by Modhu Sudan on the 4th October 1892, which was revoked by the later will and was filed in Court. The application was opposed by Nistarini Dasi, the widow of Modhu Sudan, in a petition put in on the 31st January 1893, in which she denied the genuineness of the second will, refused to admit the first will, and also asserted that Shama Charn, the appellant, was not the adopted son of the deceased. On the 23rd February, Nistarini presented a petition withdrawing her objections. Thereupon, on the 27th February 1893, the respondent, who is one

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of the daughters of the deceased, filed a petition of objection denying the genuineness of the will, asserting that Shama Churn was not the adopted son, and that the withdrawal by Nistarini was the result of collusion, and praying to be made a party to the suit. The District Judge having refused to do this the will was proved in common form, and probate granted. The respondent appealed to the High Court which set aside the decision of the District Judge and remanded the matter in order that she might have an opportunity of contesting the case, and that the will might be proved in solemn form. On the 25th June 1894, the District [526] Judge decided in favour of the will; he found that it was executed by Modhu Sudan and that he was then of sound and disposing mind. As to the adoption of Shama Charn he said :—

"I have mentioned that an allegation was made by the objector denying that Shama Charn was the adopted son of Modhu Sudan, in order to show that it was not probable the deceased should have executed such a will. Evidence was given that Shama Charn was treated by Modhu Sudan as an adopted son, was spoken of as an adopted son by Modhu Sudan when giving evidence. Not a particle of testimony to support the objector's allegation was given. Though two sons-in-law, a cousin, and a servant of Modhu Sudan were examined, not one of them was asked a single question whether Modhu Sudan had adopted Shama Charn. The alleged improbability therefore fails.

The evidence in the record fully supports this opinion.

On the 29th July 1895 the High Court on the appeal of Khettromoni, reversed the decree of the District Judge and ordered the application for probate to be dismissed.

The first witness examined in support of the will was Sri Narain Babu the writer of it. His evidence was that Tincowri Banerji, another witness, was sitting near Modhu Sudan and repeated what he had said, although the witness could hear it himself; that at the time of the will being written out Modhu said: "There are Rs. 6,000 due to me on a mortgage. Of this sum Rs. 2,000 are to be given to Kedar Nath, Prio Nath, and Bhut Nath each;" that just then some one came in and said that Bhut Nath was dead, and some one asked what was to be done with the Rs. 2,000 allotted to Bhut Nath. Modhu Sudan said "Let Rs. 1,000 be given to his widow and Rs. 1,000 to his mother." The witness said he made provision accordingly in the will; he forgot whether it had already been written in the will, that Bhut Nath was to get Rs. 2,000 or whether this had only been mentioned by Modhu Sudan, he could not say without looking at the will. Now the second paragraph of the will contains a gift of Rs. 2,000 to Bhut Nath and the ninth the gifts of Rs. 1,000 each to his mother and widow. Tincowri Banerji deposed that Sri Narain wrote the will and he asked questions and Modhu Sudan "made known the terms of the will" that he said Rs. 6,000 would be given to his three nephews, this was written, and then the document was read over and [527] Modhu Sudan signed it and after him the witnesses. Some one said "Let the will remain in Tincowri's keeping," and so it was given to him and he took it. He went on to say that afterwards Kedar said to him "What is written in the will is false." He said "How is that?" Kedar said "My brother is dead, and he has been given Rs. 2,000" (Bhut Nath having shortly before died of cholera). Tincowri said "He did not know of your brother's death. If you wish I will enquire from Modhu Sudan to whom he wishes that Rs. 2,000 to be given." Then three or four of them went and said "Your nephew is very ill, if he

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dies to whom should his money be given?" He thought for a long time, perhaps a quarter of an hour, and said, 'Let Rs. 1,000 be given to his wife and Rs. 1,000 to his mother." Then this was inserted in the will. This was after the will had been executed. There was a space and the provision was inserted. There was no signature of the testator or the "witnesses." The District Judge who had the will before him was satisfied with this evidence and accordingly excluded this addition to the will from the probate. No doubt there is a discrepancy between the evidence on this point of Sri Narain and that of Tincowri. But Sri Narain may have forgotten the exact circumstances under which the ninth paragraph was inserted or may have been over zealous in his desire to support the whole will. At any rate the District Judge accepted Tincowri's version, and on that basis their Lordships cannot agree with the learned Judges of the High Court who thought that the discrepancy between the second and ninth paragraphs had not been satisfactorily explained and that it was a circumstance to excite suspicion. Peary Mohun, one of the attesting witnesses, deposed to the execution of the will and said that Modhu Sudan was all the time in his senses. Kedar Nath Kundu, a pleader, one of the nephews of the testator to whom the Rs. 6,000 were given, who was present during part of the time when as he said "Sri Narain was writing and Tincowri was asking Modhu and then telling Sri Narain what to write" added that "Modhu Sudan was in his senses. He seemed to understand everything that was said to him and he was able to give replies." The District Judge says in his judgment that it was clear to him that Kedar Nath was an unwilling witness. In his evidence he [528] appears to have been dissatisfied with what he took under the will and being one of the executors was unwilling to join in the application for probate.

The case of the respondent against the will was that no will was executed. The effect of the evidence of the six witnesses called in support of it is that during the morning when the will was said to have been executed Modhu Sudan was in an unconscious state, unable to sign a will and that no will was made. The District Judge, who saw the witnesses, has found that the will was executed by the deceased and that he was of sound disposing mind when he executed it.

The judgment of the High Court reversing this decision appears in the conclusion of it to be founded upon what is said by Lindley, L. J., in *Tyrrell* v. *Painton* (1), that whenever circumstances exist which excite the suspicion of the Court and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document. In this case, the suspicion, if there was one, would be that on the morning, when the will was said to have been made, the deceased was in an unconscious state and unable either to sign the will or to understand what he was doing, that is, that the witnesses in support of the will were not telling the truth. If they were their Lordships do not see anything to excite suspicion. The question was simply which set of witnesses should be believed. The District Judge saw them and the remarks in his judgment show that he observed their demeanour. The High Court had not that advantage. In their Lordships' opinion the probate was rightly granted and the decree for it should not have been reversed. It is not

(1) L.R. (1894) p. 151.

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necessary to decide the other questions raised in the appellant's case. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court and order the appeal to be dismissed with costs. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

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27 C. 529 = 4 C.W.N. 237.

[529] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

ROBERT WATSON & CO., LD. (*Petitioners*) *v.* AMBICA DASI AND OTHERS (*Opposite Party*).* [7th December, 1899.]

Civil Procedure Code (XIV of 1882), ss. 556, 558—Second Appeal—Order refusing to re-admit Appeal—Dismissal of Appeal for default—Pleader asking for time to go on with a case.

The provisions of ss. 556 and 558 of the Civil Procedure Code do not apply, when the pleader for the appellant not merely informs the Court that he has no instructions, but makes an application for postponement, which is refused, and the appeal is thereupon dismissed.

A second appeal does not, therefore, lie in such a case from an order of the first appellate Court refusing to re-admit an appeal under the provisions of s. 58 of the Code of Civil Procedure.

[**Overr.**, 34 C. 403 (F.B.) = 5 C.L.J. 247 = 11 C.W.N. 329 = 2 M.L.T. 123; **Diss.**, 8 C. W.N. 621 (625); **R.**, 17 C.P.L.R. 1 (2).]

CERTAIN appeals were preferred in the Court of the District Judge of Midnapore against the decision of the Deputy Collector regarding assessment of rent of the appellant's *mehal*. When the appeals came on for hearing before the District Judge, on the 25th March 1898, the appellant's pleader said that he had received no instructions, and he asked for two hours' time. The District Judge declined to allow time and dismissed the appeals, on the ground that, as the case was a complicated one and involved the consideration of the interests of various classes of tenants, it was quite impossible to get it up in that time, and the result would be that the Judge "would have to work out the whole case with little, if any, assistance."

The appellants then applied for restoration of the appeals under s. 558 of the Code of Civil Procedure. That application was refused on the 18th of April 1898. The appellants then appealed to the High Court from the said order of the District Judge refusing to re-admit the appeals.

Babus *Jogesh Chandra Roy* and *Surendra Nath Ghosal*, for the appellants.

Babus *Lal Mohan Das* and *Sarat Chunder Dutt*, for the respondents.

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* Appeal from Order No. 251 of 1898, against the order of H. R. H. Coxe, Esq., District Judge of Midnapur, dated the 18th of April 1898.

1899 DEC. 7.

APPELLATE CIVIL.

27 C. 529 = 4 C.W.N. 237.

[530] The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order of the District Judge of Midnapur, dated the 18th of April 1898, refusing to re-admit an appeal under the provisions of s. 558 of the Code of Civil Procedure. The facts of the case are these: This case, after several postponements, was called on for hearing before the District Judge on the 25th of March 1898, and on that date the pleader for the appellant said that he had received no instructions. He then proceeded to ask for two hours' time, as the case was a complicated one and involved considerations of interest to various classes of tenants. The application was refused, and the District Judge accordingly dismissed the appeal. The appellant then applied, under s. 558, for the re-admission of the appeal which, as has been said before, was rejected. The learned pleader for the appellant urges that the District Judge was wrong in refusing to give the pleader, who appeared before him, two hours' postponement as asked for. He says that no doubt the District Judge had a discretion to allow this or to refuse it, and that he has improperly exercised his discretion; and he further calls attention to an affidavit of the mooktear of the plaintiff, showing that he had gone away on some business, and was not able to instruct the pleader. Furthermore it was pointed out to us that the orders passed in this case were not brought to the notice of the pleaders for the appellant, and they were not made to sign those orders. We need not say much about these matters, but we must remark in passing that we cannot admit the justness of the last criticism. It is not the duty of the officers of the Court to call upon the pleaders to sign the orders issued, or to inform them of the nature of the orders passed. It is for the pleaders to be present at the proceedings, and to make themselves acquainted with the orders passed. But we need not discuss these matters, because a preliminary objection has been raised by the learned pleader for the respondent to the effect that the appellant has mistaken his remedy, and that his remedy should have been, not by an appeal from the order of the 18th April 1898, but by a second appeal from the order of the 25th March 1898; inasmuch as the case was not decided *ex parte*, under the **[531]** provisions of s. 556 of the Code of Civil Procedure, but was decided after the appellant's pleader had put in an appearance and had moved for the adjournment of the case.

We must admit the force of this contention. It would seem that had the pleader for the appellant merely informed the Court that he had no instructions and refrained from taking any steps in the case, the provisions of ss. 556 and 558 would have been applicable. But in this case he did more. He made an application for postponement, and it is his grievance in this case that the postponement was not granted. We think that ss. 556 and 558 do not apply; and in this connection we may cite the case of *Shibendra Narain Chowdhuri* v. *Kinoo Ram Dass* (1). In this case it will be observed that the pleader, though present, was not prepared to go on, but he made no further application in the case; and so the provisions of ss. 556 and 558 were held to be applicable. In another case, that of *Ram Chandra Pandurang Naik* v. *Madhav Purushottam Naik* (2), the same distinction was made. In this case, it is said that if the pleader for the appellant had stated that he had received no instructions, the Court could

(1) 12 C. 605. (2) 16 B. 23.

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have held that there was no proper appearance. But that was not the case. The pleader for the appellant asked for an adjournment for certain reasons, and on this ground it was held that ss. 556 and 558 did not apply. Following this ruling, we consider that the contention of the pleader for the respondent in this case must prevail.

The appeal is dismissed with costs—one gold mohur.

This decision will also govern appeal No. 252 of 1898, which is also dismissed with costs—one gold mohur.

M. N. R. *Appeal dismissed.*

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27 C. 532.

[532] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Harington.

MADHU LAL AHIR GAYAWAL (*Plaintiff*) *v.* SAHAI PANDE DHAMI (*Defendant*).* [27th April, 1900.]

Malicious Prosecution—Suit for Damages for Malicious Prosecution—Malice—Dishonest Motive—Effect of bringing a charge of 'Assault' for 'Criminal Intimidation'—Damages—Reasonable and Probable Cause—Penal Code (Act XLV of 1860*),* ss. 351, 352, 503.

Where, in a suit for damages for malicious prosecution on a charge of assault which was dismissed, it appeared from the facts as found by the Lower Courts that there was 'Criminal Intimidation' on the part of the plaintiff although he was not charged with that offence by the defendant—

Held, that the plaintiff would not be entitled to any damages, as no malice of dishonest motive could be imputed to the defendant in bringing the charge of 'assault.'

ONE Durga Dutt Singh, a wealthy zemindar of Modhubani, went on pilgrimage to Gya, and thence he proceeded to the shrine on the Ramsila Hill, accompanied by the plaintiff and his retainers. The plaintiff belongs to a class of priests called *Gayawals* who officiate at the religious ceremonies performed by pilgrims at certain places within Gya proper. And the defendant belongs to a class of priests known as *Dhamis*, who officiate at the ceremonies performed at Ramsila Hill and certain other places. Durga Dutt made some gifts or offerings at the Ramsila Hill, one half of which was claimed by the plaintiff in accordance with an alleged custom. The defendant repudiated his claim altogether, and took away the whole of the gifts. There was an altercation between the parties regarding the apportionment of these offerings, which ended in a criminal prosecution instituted by the defendant charging the plaintiff with assault. An information was also given by the defendant to the police soon after the occurrence. The plaintiff was in due course tried for assault under s. 352 of the Penal Code and acquitted by the Criminal Court. Upon that he brought this suit for damages for false and malicious prosecution. The [533] Munsif gave judgment for the plaintiff holding that the charge of assault was false and malicious, and that there was no reasonable and probable cause for such a charge though there was criminal intimidation on the part of the plaintiff.

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* Appeal from Appellate Decree No. 713 of 1898, against the decree of H. Holmwood, Esq., District Judge of Gya, dated the 22nd of December 1897, reversing the decree of Moulvie Abdul Bari, Munsif of Gya, dated the 23rd of June 1897.

On appeal the District Judge reversed the decision of the Munsif and dismissed the plaintiff's suit in the following terms :—

"The Munsif finds that the plaintiff criminally intimidated the hill priest, but that he did not assault him as alleged. This is putting the cart before the horse.

"The offence of criminal intimidation is a very much graver one than that of common assault, and in a case of this kind where the defendant was compelled to retire, owing to the intimidation, it includes that change of motion which amounts to assault. There was certainly a nasty row on the hill that day, so nasty that the Behari gentleman whose offerings were the bone of contention, discreetly retired from the scene altogether, leaving the disputants to fight it out. It is absurd to suppose that the hill priest had a large following, while the *Gayawal* had none. The *Dhamis* are single men who take it in turn to officiate at the hill temples, while the *Gayawals* always have *piyadas* and other followers, and one *lathial* is admitted in the evidence. There seems to me to have been every reason for bringing a case of assault against the plaintiff, and the appeal must be decreed and plaintiff's case dismissed with costs in both Courts."

Against this order the plaintiff appealed to the High Court.

Babu *Umakali Mukerji* and Babu *Srish Chunder Chowdhuri*, for the appellant. The District Judge was wrong in finding that there was a reasonable cause for the criminal prosecution. The defendant brought a false charge of assault against my client and that was dismissed. The Munsif found there was criminal intimidation on the part of the plaintiff, but that was nobody's case. What the Munsif probably meant by "criminal intimidation" was that there was some sort of pressure put upon the defendant, and not as defined in the Penal Code, s. 503. [GHOSE, J.—Under what section of the Penal Code was your client prosecuted ?] Under s. 352. In criminal intimidation (s. 503) a threat to 'injure' would be a necessary element, but in this case there was none. [HARINGTON, J.—Can you say that the defendant had not the honest belief, that he had a reasonable and probable cause for this prosecution, when the circumstances of criminal intimidation existed ?] The learned District Judge has **[534]** not dealt with the case in that way, there being nothing to that effect in his judgment. [GHOSE, J.—Would not "cause alarm" in s. 503 of the Indian Penal Code include assault ? Threat to injure might have been by gesture or preparation.] "Criminal intimidation" does not include "assault" which is a distinct offence as defined by s. 351 of the Penal Code. If "criminal intimidation" had really been committed by my cilent, the defendant's legal advisers would have brought that charge against him ; and, besides, there is no evidence of threat or intimidation. "Change of motion" mentioned by the District Judge in his judgment is not a necessary element to constitute intimidation. The information to the police followed by a charge of assault shows malice on the part of the defendant.

Babu *Jogesh Chunder De*, for the respondent was not called upon.

JUDGMENT.

The judgment of the Court (GHOSE and HARINGTON, JJ.) was delivered by—

GHOSE, J.—This appeal arises out of a suit for damages for malicious prosecution of the plaintiff in a Criminal Court for assault.

The prosecution, upon the facts found by the Judge, seems to have been the outcome of a quarrel between the plaintiff and the defendant

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about certain offerings which a pilgrim to Gya had made. It would appear that in the course of that quarrel there was a disturbance, and it went so far as to compel the pilgrim and his party to retire from the place, leaving the plaintiff and the defendant and their partisans to fight out the dispute. The defendant subsequently brought a complaint against the plaintiff for assault under s. 352 of the Penal Code. That complaint, however, was not substantiated, and it was accordingly dismissed.

The Court of first instance found that there was criminal intimidation offered by the plaintiff to the defendant, though there was no actual assault; and the Munsif, being of opinion that there was no justifiable cause for the institution of the complaint by the defendant, gave the plaintiff a decree for damages.

On appeal, the District Judge apparently accepts the finding [535] of the Munsif that there was criminal intimidation on the part of the plaintiff; and having regard to that fact, as also to the other facts to which we have already referred, has come to the conclusion that there was "every reason for bringing a case of assault against the plaintiff," and therefore the latter is not entitled to any damages.

It will be observed that the charge of criminal intimidation as defined in s. 503 of the Penal Code is a graver charge than that of simple assault as defined in s. 351 of that Code. In many cases of the kind, a charge of assault may be taken to be included in a charge of criminal intimidation; and if the fact be, as it seems to have been found by both the Munsif and the District Judge, that there was good cause for bringing a charge of criminal intimidation if the defendant had brought such a charge, it would be almost impossible to say that there was any malice or dishonest motive on the part of the defendant in bringing a charge of assault against the plaintiff.

In this view of the matter, we think that the judgment of the learned Judge should not be interfered with in this appeal; and we accordingly dismiss the appeal with costs.

B. D. B. *Appeal dismissed.*

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27 C. 535.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

WILLIAM SHERIFF (*Defendant*) *v.* JOGEMAYA DASI AND OTHERS (*Plaintiffs*).* [13th December, 1899.]

Bengal Tenancy Act (VIII of 1885), *ss.* 15 *and* 16—*Arrears of rent, suit for—Suit by a* putnidar *on the death of the last owner against the* durputnidar, *without complying with the provisions of* s. 15, *of the Bengal Tenancy Act, whether maintainable—Holder of a tenure.*

In a suit for arrears of rent for the years 1299 B.S. to Falgoon 1302 B.S. brought by *putnidars* on the death of the last owner on the 14th Aghran 1302 B. S., the defence of the *durputnidar* mainly was that the plaintiffs not having complied with the provisions of s. 15 of the Bengal Tenancy Act, the suit was not maintainable.

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* Appeal from Appellate Decree No. 480 of 1898, against the decree of G. K. Deb, Esq., District Judge of Nuddia, dated the 13th of January 1898 modifying the decree of Babu Ananta Ram Ghose, Subordinate Judge of that District, dated the 3rd of December 1896.

[536] *Held*, that as the plaintiffs did not claim the rent, which fell due during the lifetime of the last owner, as the holder of the tenure, but claimed it either as the representative of the holder of the tenure for the time being or as representative of their father, the rent became an increment to the estate of the father, and therefore the suit was maintainable—*Nogendra Nath Bose* v. *Satadul Bashini Bose* (1) referred to.

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[R., 16 Ind. Cas. 419 (152)=8 N.L.R. 107.]

THIS appeal arose out of an action for arrears of rent with interest for 1299 B.S. to Falgoon 1302 B.S., brought by the plaintiffs' *putnidars* of a certain *taluq* against one Mr. Sheriff for self and as attorney on behalf of certain other persons, who were *durputnidars*. The allegations of the plaintiffs were that on the death of their father, their mother succeeded to all the properties left by him, and on their mother's death, on the 14th of Aghran 1302 B.S., they, as daughters and heirs of their father, succeeded to the said properties; that the defendants took a *durputni* settlement of certain *putni mehals* owned and held by their father at an annual rent of Rs. 747; that the defendant paid rent up to the year 1298 B.S., but did not pay any rent since the year 1299 B.S., and hence the suit. The defence of the defendant, Mr. Sheriff, mainly was that the suit could not proceed, inasmuch as neither the mother of the plaintiffs nor they had complied with the provisions of s. 15 of the Bengal Tenancy Act. The Court of first instance dismissed the suit on the ground that inasmuch as the provisions of s. 15 of the Bengal Tenancy Act had not been complied with, it was not maintainable. On appeal the learned District Judge allowed a portion of the plaintiffs' claim, namely, rent for the period which fell due during their mother's lifetime, but disallowed the claim, so far as the rent for 1299 B.S. was concerned, holding it barred by limitation. Against this decision the defendant appealed, and the plaintiffs preferred a cross-appeal to the High Court.

Babu *Srinath Dass* (with him Babu *Brojo Lall Chuckerbutty*), for the appellant.

Babu *Saroda Churn Mittra* (with him Babu *Shiva Prosanna Bhuttacharjee*), for the respondents.

[537] The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff-respondents, who are *putnidars* of a certain share in a zemindari to recover arrears of rent due from the defendants in respect of a *durputni* held by them under the plaintiffs.

The defence, so far as it is necessary to be considered for the purposes of the present appeal, was to the effect that, as neither the plaintiffs nor their predecessor, their mother, Nistarini Dasi, had complied with the requirements of s. 15 of the Bengal Tenancy Act, they were debarred by s. 16 of that Act from maintaining this suit.

The first Court gave effect to the defendant's objection and dismissed the suit. On appeal by the plaintiffs the lower appellate Court has given them a decree in respect of a part of their claim, namely, that portion of it which relates to the rent that fell due during the lifetime of the plaintiffs' mother, except the rent for 1299, which was held to be barred by limitation.

(1) 3 C.W.N. 234.

1899 DEC. 13. — APPELLATE CIVIL. — 27 C. 535.

Against this decree the defendants have appealed, and the plaintiffs have preferred a cross-appeal.

The contention of the defendant in his appeal is that the lower appellate Court is wrong in holding that the claim for the rent that fell due during the plaintiffs' mother's lifetime was not barred by s. 16 of the Bengal Tenancy Act. In the cross-appeal it is urged that the lower appellate Court is wrong in holding that the claim for the rent for 1299 was barred by limitation, and a further ground is urged on behalf of the plaintiffs, namely, that the decree of the lower appellate Court has, without any reason, omitted to allow interest upon the arrears decreed.

In support of the appeal of the defendant it is argued that as the plaintiffs' mother, who succeeded her husband, but who did not comply with the requirements of s. 15 of the Bengal Tenancy Act, could not, by reason of the provisions of s. 16 of that Act, have maintained a suit for rent if she had brought such a suit in her lifetime, the plaintiffs, who claimed as her representatives, ought to have been held to be similarly barred. We are of opinion [538] that this contention ought not to succeed. Section 16 of the Bengal Tenancy Act is a penal provision, and should be strictly construed. What that section says is that a person becoming entitled to a permanent tenure by succession shall not be entitled to recover by suit (we refer to so much of the section as bears upon the present question), any rent payable to him as the holder of the tenure until the Collector has received the notice and fees referred to in the last foregoing section. Now can it be said that the plaintiffs are claiming the rent that fell due during their mother's time as the holders of the tenure? We think not. They are claiming that rent as the representatives of the holder of the tenure for the time being, or as the representatives of their father, entitled to the rent which accrued due during his widow's lifetime, but which was not recovered by her, and which, therefore, became part of their father's estate. But upon neither view can it be said strictly that they are entitled to this rent as the holders of the tenure. If that is so, s. 16 of the Bengal Tenancy Act cannot bar their claim so far as that portion of it is concerned. The view we take is in accordance with that taken by this Court in the case of *Nogendra Nath Bose* v. *Satadul Bashini Bose* (1) upon the construction of a somewhat similar provision of the law, namely, s. 78 of Act VII of 1876, Bengal Council. It is true that the name of the predecessor in interest in that case had been registered under Act VII of 1876, whereas in this case the name of the lady. Nistarini Dasi, was not registered, but that does not make any difference so far as the determination of the present question goes. Moreover upon the view that the plaintiffs are entitled to the rent that accrued due during their mother's life-time not merely as their mother's heirs, but as reversionary heirs entitled to whatever became an increment to the estate of their father, the fact of the non-registration of Nistarini's name or of non-compliance by her with the requirements of s. 15 of the Bengal Tenancy Act would be wholly immaterial.

It was argued that it would be anomalous to hold that although, if Nistarini Dasi had brought a suit for this rent she could not have maintained it, the plaintiffs may nevertheless [539] maintain this suit notwithstanding that neither her name nor the name of the plaintiffs have been registered. Perhaps that may appear somewhat anomalous, but the opposite view would result in a greater anomaly and indeed in hardship and

(1) 3 C.W.N. 294.

injustice; for it may so happen that a son succeeding his father may not comply with the requirements of s. 15 of the Bengal Tenancy Act immediately, but may expect to do so at any time within three years, that is before his claim for rent is barred, and then he may die suddenly; and then if s. 16 is to apply to the claim of his heir or successor for rent, which accrued due during his lifetime, that claim would be irrecoverably lost, as his heir or successor could not possibly satisfy the requirements of s. 15 so far as he was concerned.

We are therefore of opinion that the lower appellate Court was right in decreeing the portion of the claim that relates to the rent which fell due during the plaintiffs' mother's lifetime.

Turning now to the cross appeal, we find that the first ground, namely, that relating to limitation, is based upon a misconception of facts. This is conceded by the learned vakil for the respondents.

As to the second ground, namely, that the decree has without reason omitted to award interest, we think that the respondent's contention is sound.

The decree of the lower appellate Court will, therefore, be modified by allowing interest at the rate of twelve per cent. per annum upon the amount decreed up to the date of the decree, and interest at the rate of six per cent. per annum from the date of the decree until realization.

The appeal is dismissed, and the cross-appeal decreed in part with costs.

Appeal dismissed and cross-appeal decreed in part.

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27 C. 540=4 C.W.N. 459.

[540] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

FAKERA PASBAN (*Defendant* No. 4) *v.* BIBI AZIMUNNISSA (*Plaintiff*).* [19th and 20th December, 1899.]

Limitation—Bengal Tenancy Act (*VIII of* 1885), *sch. III, art.* 3—*Limitation Act* (*XV of* 1877), *s.* 22—*Civil Procedure Code* (*XIV of* 1882), *s.* 32—*Parties—Adding parties to suit—Adding party by a Court of its own motion.*

No question of limitation arises, and s. 22 of the Limitation Act does not apply, when the Court of its own motion acts under s. 32 of the Code of Civil Procedure, and orders that the name of any person be added as a defendant.

Grish Chunder Sasmal v. *Dwarka Nath Dinda* (1), and *The Oriental Bank Corporation* v. *Charriol* (2) followed. *Khadir Moideen* v. *Rama Naik* (3) referred to, and *Imam-ud-din* v. *Liladhar* (4) differed from.

[**Overr.**, 35 C. 519 (**F.B.**)=5 C.L.J. 242=11 C.W.N. 350=2 M.L.T 137; **R.**, 28 B. 11 (15)=5 Bom.L.R. 618; 69 P.R. 1906=118 P.L.R. 1906; **Cons.**, 34 C. 582=9 C.W.N. 421; **D.**, 33 C. 613 (620)=3 C.L.J. 576=10 C.W.N. 551; 57 P.R. 1905=76 P.L.R. 1905 (**F.B**).]

THE plaintiff, Bibi Azimunnissa, instituted a suit on the 5th October 1896, against Babu Raja Ram and Babu Bulak Ram, the defendant's 1st

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* Appeal from Appellate decree No. 1950 of 1898, against the decree of W. H. Vincent, Esq., District Judge of Bhagulpur, dated the 4th of July 1898, affirming the decree of Babu Rajendra Nath Dutt, Munsif of Madhepura, dated the 21st of December 1897.

(1) 24 C. 640. (2) 12 C. 642. (3) 17 M. 12. (4) 14 A. 524.

1899 DEC. 20. — APPELLATE CIVIL. — 27 C 540 = 4 C.W.N. 459.

party, her landlords, and one Jhonty Dass, the defendant 2nd party, a tenant of the defendants 1st party, for the recovery of possession of a plot of land, on the allegation that the disputed plot was comprised in an ancestral holding which she inherited and held, until she was dispossessed therefrom by the said defendants on the 15th April 1895.

The defendants 1st party put in a written statement in which they alleged that the plaintiff's husband remained in possession of the disputed land, under an *ijara* lease, till 1298 F. S.; but that since 1299 F. S., they took *khas* possession of the same, and that in 1300 F. S., the said land was settled by them with one Fakera Pasban, who was in possession thereof. They further alleged that the defendant 2nd party was acting in collusion with the plaintiff.

[541] Fakera Pasban, was thereupon added as a defendant by the Court of its own motion by an order, dated the 8th September 1897. He put in a written statement supporting the defendants 1st party, but in his deposition he made some contradictory statements as to when and how he came into possession of the disputed land.

On the merits, the Munsif found in favour of the plaintiff. As regards the plea of limitation raised by the defendants, he found that the plaintiff having been dispossessed after Cheyt 1302 F. S. and the suit having been brought within two years from the date of dispossession, it was not barred by limitation. It was, however, contended on behalf of the defendant Fakera Pasban that as he had admittedly been made a defendant in the suit more than two years after the date of dispossession alleged in the plaint, the suit *as against him* was barred by limitation. The Munsif overruled this plea on two grounds: (1) That it was not the plaintiff's case that Fakera Pasban had dispossessed her, and further that the Court found that Fakera Pasban had not really been in possession of the disputed land; (2) and that Fakera having been made a party to the suit, not at the instance of the plaintiff, but rather against her protest, the question of limitation did not arise. *Grish Chunder Sasmal* v. *Dwarka Nath Dinda* (1). The Munsif, accordingly, decreed the suit.

The landlord-defendants and Fakera Pasban then appealed to the District Judge, and urged that the suit was barred as against Fakera Pasban, and consequently must fail against all the defendants. The District Judge, agreeing with the Munsif, dismissed the appeal, adding, that "as it is found that Fakera is really not a tenant at all, but merely a peon of the zemindar who is put forward to fight a case on behalf of his master, the two years' limitation rule does not apply."

Fakera Pasban appealed to the High Court. The appeal came on for hearing on the 19th December 1899.

Babu *Jogesh Chandra Roy*, for the appellant contended that the suit was barred against the defendant-appellant by art. 3, [542] sch. III of the Bengal Tenancy Act. As against that defendant, it must be taken to have been instituted when he was made a party. See s. 22 of the Limitation Act. The case of *Grish Chunder Sasmal* v. *Dwarka Nath Dinda* (1) was not correctly decided, as it proceeded upon a mis-conception of the decision in *The Oriental Bank Corporation* v. *Charriol* (2), which did not decide the question raised. There is no decision in the latter case as to the applicability of s. 22 of the Limitation Act; it only decided that the Court could, of its own motion, add any person as a party to the suit, but it did not decide, nor was it necessary to decide, the effect of s. 22 on the

(1) 24 C. 640. (2) 12 C. 642.

question of limitation. The question of limitation could not arise in that case. The case of *Imam-ud-din* v. *Liladhar* (1) is in my favour. 1899 DEC. 20.

Moulvi *Mahomed Mustafa Khan*, for the respondent, contended that art. 3, sch. III, of the Bengal Tenancy Act, did not apply, as it had been found that the appellant was not a tenant at all, and hence there could not have been any dispossession by him. Besides the party having been added by the Court, no question of limitation could arise. *Grish Chunder Sasmal* v. *Dwarka Nath Dinda* (2). [RAMPINI, J.—There is a Madras case, *Khadir Moideen* v. *Rama Naik* (3), which supports the Calcutta ruling.] APPELLATE CIVIL. 27 C. 540=4 C.W.N. 459.

Babu *Jogesh Chandra Roy*, in reply, contended that *Khadir Moideen* v. *Rama Naik* (3) was distinguishable from the present case. There the party had already been on the record.

DECEMBER 20TH: The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows:—

JUDGMENT.

This is an appeal from the decision of the District Judge of Bhagulpore, dated the 4th July 1898, in which he affirms the decision of the Munsif of Madhepura giving the plaintiff a decree [543] for possession of certain lands. The plaintiff sues as occupancy *ryot* to recover possession of the land, of which she says she has been dispossessed by the defendants Nos. 1 to 3 who are her landlords. The suit was brought as against these landlords within a period of two years, but a 4th defendant, namely, Fakera Pasban, was added as a party-defendant in the suit by the Court of its own motion, and this party was not added until the 8th of September 1897, when more than two years had expired from the date of the alleged dispossession.

The Courts below have held that the suit is not barred by limitation as against this defendant Fakera Pasban, who was added as a party, as he was alleged to be a tenant of the land. The lower appellate Court, however, has found that he was not a tenant of the land but was merely fighting the case on behalf of the defendants Nos. 1 to 3 and in collusion with them. The learned pleader for this defendant Fakera Pasban, who is the appellant in this case, contends that this view of the District Judge is wrong, and that the suit is barred by limitation as against him for two reasons: *First*, that the learned Judge was wrong in relying upon the case of *Grish Chunder Sasmal* v. *Dwarka Nath Dinda* (2) on the authority of which he has held that no question of limitation arises in this case so far as the defendant No. 4 Fakera Pasban is concerned; and *secondly*, he urges that the period of limitation applicable to this defendant is two years as laid down in art. 3 of sch. III of the Bengal Tenancy Act. We, however, are unable to admit the correctness of either of these pleas. In the first place we think it has been laid down clearly in the case of *Grish Chunder Sasmal* v. *Dwarka Nath Dinda* (2) referred to above, that "where the Court acting on information brought to its notice adds a party, who it thinks is necessary for the disposal of the suit, no question of limitation arises."

In coming to this decision the learned Judges have followed the case of *The Oriental Bank Corporation* v. *Charriol* (4). Furthermore we are fortified in our view that these decisions are correct

(1) 14 A. 524. (2) 24 C. 640. (3) 17 M. 12. (4) 12 C. 642.

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[544] by the case of *Khadir Moideen* v. *Rama Naik* (1). The pleader for the appellant, however, cites the case of *Imam-ud-din* v. *Liladhar* (2), and he says that the learned Judges, who decided the case of *Grish Chunder Sasmal* v. *Dwarka Nath Dinda* (3) have gone beyond the ruling laid down in the case of *The Oriental Bank Corporation* v. *Charriol* (4) inasmuch as that decision was never intended to prescribe that when a Court adds a person as a necessary party to a suit under s. 32 of the Code of Civil Procedure, it is free from the restrictions imposed upon it by s. 22 of the Limitation Act.

Now, we have considered the case of *The Oriental Bank Corporation* v. *Charriol* (4), and in our opinion the Judges, who decided that case, *did* intend to lay down such a rule, although the provisions of s. 22 of the Limitation Act are not expressly referred to in their judgment in that case. But we think that that was their intention from the reasons given at full length in pp. 650 to 652 of the report. And we may add that in the case of *Khadir Moideen* v. *Rama Naik* (1) the provisions of s. 22 of the Limitation Act are referred to and it is there laid down [as we think it was intended to be laid down in the case of *The Oriental Bank Corporation* v. *Charriol* (4)], that s. 22 of the Limitation Act does not apply, when the Court of its own motion acts under s. 32 of the Code of Civil Procedure, and orders that the defendant be made a plaintiff; and there can be no question that this was the intention of the learned Judges, who decided the case of *Grish Chunder Sasmal* v. *Dwarka Nath Dinda* (3). For these reasons we must follow the two rulings of this Court above cited, and from which we see no reason whatever to dissent, and in these circumstances we must hold that no question of limitation arises in the present case, and that the judgment of the District Judge is correct on the question of limitation.

That being so, the second plea raised by the learned pleader for [545] the appellant falls to the ground, and it is not necessary for us expressly to deal with it. At the same time we may point out that in this case the plaintiff does not ask for any relief as against Fakera Pasban, the defendant No. 4; that she did not sue him at all, and that it was not at her request that Fakera Pasban was made a party to the suit. Fakera Pasban was added by the Court of its own motion, and it was found that he is not in possession, and is not a tenant of the land, and that being so, it does not appear to us that the suit as instituted is barred by two years' rule of limitation provided by art. 3 of sch. III of the Bengal Tenancy Act, as regards the defendant No. 4 Fakera Pasban. However that may be, it is not necessary for us to decide this question, seeing that the appeal fails on the first of the grounds we have mentioned. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 17 M. 12. (2) 14 A. 524. (3) 24 C. 640. (4) 12 C. 642.

27 C. 545=4 C.W.N. 608.

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APPEL-LATE CIVIL.

27 C 545=4 C.W.N. 608.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

ANANDA KUMAR NASKAR (*Defendant*) v. HARI DASS HALDAR AND ANOTHER (*Plaintiffs*).* [27th April, 1900.]

Bengal Tenancy Act (VIII of 1885), ss. 15, 16 and 26—Whether an heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant—Sale of a jama *in execution of a decree for rent obtained against one of the heirs, of the last recorded tenant, from whom the landlord chose to accept rent separately and who was not recorded in the landlord's* Sheristha—*Effect of such a sale.*

An heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant.

The plaintiffs sued to recover possession of their share of certain rent-paying lands on the allegation that they were entitled to a one-third share of these lands by inheritance from the last recorded tenant, and another one-third share by purchase from one of his heirs; that the defendants Nos. 2 and 3 were entitled to the remaining one-third share; that for some years they and the said defendants have been paying rent to the landlord and obtaining separate rent receipts; that the defendants Nos. 2 and 3 in collusion with the landlord allowed a decree to be passed against them in respect of [546] the entire *jama*, in execution of which the said lands were sold and purchased by defendant No. 1. The defence of defendant No. 1 *inter alia*, was that as the rent suit brought by the landlord was against the person who was the *Sarbarakar* or Manager of the *jama*, therefore by the sale in execution of the decree obtained in that suit the entire *jama* passed.

Held that, as the landlord was bound to recognize the plaintiffs as tenants in the place of the last recorded tenant, and, also as he chose to accept rent from the plaintiffs, and the defendants Nos. 2 and 3 separately, he had no right to ignore the plaintiffs and proceed only against the defendants. The entire *jama* did not pass by the sale and the plaintiffs' right was not affected thereby.

Nitayi Behari Saha Paramanick v. *Hari Govinda Saha* (1) distinguished.

[**Rel.**, 17 C.W.N. 833=19 Ind. Cas. 989 (990); **R.**, 37 C. 75 (78)=13 C.W.N. 1110=2 Ind. Cas. 695; 12 C.L.J. 267 (268)=6 Ind. Cas. 570; 12 C.L.J. 642=15 C.W.N. 191 (194)=7 Ind. Cas. 840; 13 C.L.J. 613; 16 C.W.N. 64=9 Ind. Cas. 1001; 16 C.L.J. 89=10 Ind. Cas. 382; 18 C.W.N. 170=23 Ind. Cas. 105; **D.**, 2 N.L.R. 101 (104).]

THIS appeal arose out of an action for recovery of possession of certain lands on establishment of plaintiffs' title thereto. The allegation of the plaintiffs was that one Satrughan Haldar, Chundra Haldar, and Naba Haldar were members of a joint Hindu family, and they held a *jama* which stood in the name of Satrughan Haldar alone in the landlord's *Sheristha*; that, on partition, each of the brothers held a third share of the said *jama*; that upon the death of Chandra Haldar, the plaintiffs, his sons, succeeded to his one-third share, and they subsequently purchased from Trailucko, the son of Satrughan, his one-third share; that thus having acquired two-thirds share of the said *jama* they were in possession on payment of rent to the landlord for upwards of twelve years; that the defendants Nos. 2 and 3 were in possession of the remaining one-third share of the *jama* except the shares of homestead and tank

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* Appeal from Appellate Decree No. 2035 of 1898, against the decree of Babu Bulloram Mullick, Subordinate Judge of the 24-Pergunnahs, dated the 16th of June 1898, confirming the decree of Babu Mohini Mohun Dutt, Munsif of Diamond Harbour, dated 20th of September 1897.

(1) 26 C. 677.

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by purchase from Bhoyaram, son of Naba Haldar; that the said defendants, not being on good terms with the plaintiffs, in collusion with the agent of the landlord allowed a rent decree to be passed against them in respect of the entire *jama*, and in execution of the said decree, the *jama* was sold fraudulently, and was purchased by the defendant No. 1; that on the defendant No. 1 taking delivery of possession the plaintiffs applied under s. 335 of the Civil Procedure Code for recovery of possession, but their application was rejected, and hence this suit was brought by them. The defence mainly was that the suit was barred by limitation; that [547] it was bad for non-joinder of parties; that Srinath Haldar, defendant No. 2, was the *Sarbarakar* of the *jama*, that there was no *jama* which stood in the name of Satrughan Haldar; that the rent decree obtained by the landlord against defendant No. 2 was not a fraudulent one, and by the sale, in execution of which the defendant No. 1 purchased, the entire *jama* passed. The Court of first instance decreed the suit of the plaintiffs, holding that by the execution sale the plaintiffs' rights were not affected. On appeal the Subordinate Judge confirmed the decision of the First Court. Against this decision the defendant No. 1 appealed to the High Court.

Dr. *Ashutosh Mookerjee*, for the appellant.—The Court below was wrong in holding that the plaintiff's rights were not affected by the execution sale. The landlord was not bound to recognize the plaintiffs as tenants of the *jama*; they being the heirs of the last recorded tenant, and purchasers also of a certain share of the *jama* from one of the heirs, were bound to register their names in the *Sheristha* of the landlord on the death of the recorded tenant; they having failed to do so the landlord chose to bring the suit for arrears of rent against defendant No. 2, who was the *Sarbarakar* of the *jama*, and obtained a decree. In execution of this decree the *jama* was sold and was purchased by the defendant No. 1. The whole tenure passed by this sale, and not merely the right, title and interest of the judgment-debtor. See the case of *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha* (1). The *jama* being an occupancy holding, neither the heir of the last recorded tenant nor the transferee from an occupancy raiyat can compel the landlord to register his name, and to recognize him as a tenant. See *Ambika Proshad* v. *Chowdhry Keshri Sahai* (2), *Kuldip Singh* v. *Gillanders Arbuthnot & Co.* (3).

Babu *Nil Madhob Bose* (with him Babu *Shib Chundra Palit*), for the respondent, was not called upon.

The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows :—

JUDGMENT.

[548] BANERJEE, J.—This appeal arises out of a suit brought by plaintiffs-respondents to recover possession of a two-thirds share of certain rent-paying lands on the allegation that the plaintiffs were entitled to a one-third share by inheritance from the last recorded tenant, and to another one-third share by purchase from one of his heirs; that the defendants Nos. 2 and 3 were entitled to the remaining one-third share; that the plaintiffs and the defendants Nos. 2 and 3 had been paying rent to the landlords and obtaining separate rent receipts for some years; that subsequently, misunderstandings having arisen between the plaintiffs and the defendants Nos. 2 and 3, these latter colluded with the landlords, and

(1) 26 C. 677. (2) 24 C. 642. (3) 26 C. 615.

caused a rent suit in respect of the entire *jama* to be brought against them and allowed a decree to pass, in execution of which the lands were sold and purchased by the defendant No. 1. 1900 APRIL 27.

The defendant No. 1 denied the plaintiffs' right, and contended that the rent suit was brought by the landlords against the person who was the *Sarbarakar*, or manager, of the *jama*, and in execution of the decree obtained in that suit, the lands were sold and purchased in good faith by the defendant No. 1. The Courts below have held that the execution sale did not affect the rights of the plaintiffs, and they have accordingly given the plaintiffs a decree. In second appeal it is contended, on behalf of the defendant No. 1, *firstly*, that the suit could not proceed in the absence of the landlords; and *secondly*, that the Courts below were wrong in holding that the sale in execution of the rent decree obtained by the landlords could not pass the whole tenure, but passed merely the right, title, and interest of the judgment-debtor.

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As to the first point, we think it sufficient to say that as the plaintiffs seek to recover possession of their share of the lands in dispute upon establishment of their right, and have made the persons in possession of the land, who claimed title to the land as against the plaintiffs, parties to the suit, there could be no objection to the suit proceeding, merely because the landlords, at whose instance the defendant No. 1 made his purchase, had not been added as parties.

In support of the second contention it is argued that the [549] landlords were not bound to recognise the plaintiffs as the persons entitled to the *jama*, because it is an occupancy holding, and in respect of an occupancy holding, neither the heir of the last tenant, nor the transferee from an occupancy raiyat, can compel the landlord to recognise him and register his name; and the cases of *Ambika Pershad* v. *Chowdhry Keshri Sahai* (1) and *Kuldip Singh* v. *Gillanders Arbuthnot & Co.* (2), are relied upon.

We are of opinion that this contention is not sound. In the first place, the argument assumes that the *jama* is an occupancy holding, and not a tenure, as it has been described in the sale certificate, which is the document upon which the defendant No. 1 must rely. If it is a tenure, the learned vakil for the appellant very properly concedes that an heir as well as a transferee, even though of a part, would be entitled to compel the landlord to recognize him under ss. 15 and 17 of the Bengal Tenancy Act.

We are of opinion that no objection having been raised by the defence as to the plaintiffs not being entitled to claim any recognition by reason of the *jama* being an occupancy holding, and the defendant's own title deeds showing that it is a tenure and not an occupancy holding, the question sought to be raised before us does not arise. But even if it could be said that the *jama* was an occupancy holding, we do not think that the contention is correct so far as it relates to the right of an heir of an occupancy raiyat to claim recognition by the landlord. Such a contention would, in our opinion, be opposed to the provisions of s. 26 of the Tenancy Act, by which the right of occupancy is expressly declared to be heritable. And if the plaintiffs, granting that the *jama* was only an occupancy holding, were entitled to claim recognition as heirs of the last recorded tenant, the landlords, in bringing the rent suit in question ignoring them, acted in excess of their right, and the decree obtained in such a suit and the sale held in execution thereof cannot affect the right of the plaintiffs.

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(1) 24 C. 642. (2) 26 C. 615.

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[550] But there is something more in the facts found by the Court below, which would go to show that the decree and the sale in execution thereof cannot be held to have the effect that is sought to be attached to them. It is found that upon the death of the last recorded tenant, none of his heirs had his name recorded in the landlord's office; and that they held the land and went on paying the rent, and obtaining separate rent receipts for some years until recently, when for reasons best known to the landlords a rent suit was brought against two of them only who represented a one-third interest of the original recorded tenant. The question is whether after having chosen to accept rent from the plaintiffs and the defendants Nos. 2 and 3, the landlords had a right to ignore the former and proceed only against the latter. We are of opinion that the landlords had no such right.

Some reliance was placed upon the case of *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha* (1) as showing that the execution sale in this case ought to be held to have passed the entire tenure; but that case is clearly distinguishable from the present, as there the rent suit was brought against the registered tenant, though he was not the sole heir of the original tenant, and the facts found were that "the position of affairs for many years was for the defendants Nos. 3 and 4 to sue the defendant No. 1 alone for the rent and for defendant No. 1 to realize from the plaintiffs the amount payable by them."

We are of opinion that, upon the facts found, the view taken by the Courts below in this case was right, and the decree appealed from must be confirmed and this appeal dismissed with costs.

S. C. G. *Appeal dismissed.*

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27 C. 551 = 4 C.W.N. 764.

[551] ORIGINAL CIVIL.

Before Mr. Justice Ameer Ali.

AMRITA LAL MITTER *v.* MANICK LAL MULLICK AND OTHERS.*
[13th and 20th March, 1900.]

Hindu Law—Widow's right to a share in lieu of maintenance on a partition—Right of a purchaser from one of the sons.

A Hindu mother is entitled under the law to be maintained out of the joint family property, and if anything is done affecting that right, as for instance by the sale of any particular share by any of her sons, her right comes into existence.

A purchaser from one of the sons has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased.

Jogendra Chunder Ghose v. *Fulkumari Dassi* (2) followed.

ONE Chooni Lal Mullick died in the year 1892, leaving four sons Manick Lal, Gopessur, Johur Lal and Amrita Lal and a widow Nitomoni Dassee. The only property left by him was the house and premises No. 3/2 Gopal Chunder's Lane. The plaintiff is the purchaser of the share of Johur Lal and the Ghose defendants are the purchasers of the share of Gopessur. The plaintiff brought this suit for a partition of the said house and premises, and contended that he was entitled to a one-fourth share, though the widow of Chooni Lal was alive. The same contention was

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* Original Civil Suit No. 799 of 1899.

(1) 26 C. 677. (2) 27 C. 77.

raised by the Ghose defendants. Nitomoni Dassi, the widow of Chooni Lal Mullick, was made a party defendant.

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MARCH 13th: Mr. *B. C. Mitter*, for the plaintiff.—A mother's right to a share equal to that of each of her sons arises from the date of the partition suit, she has no pre-existing vested rights, it is given to her in lieu of maintenance. *Sorolah Dassee* v. *Bhoobun Mohun Neoghy* (1). Before a partition is effected the right of the mother is that of maintenance, which is not enforceable against purchasers for value, unless such right has been developed into a specific charge by a decree of the Court. *Bhagabati Dasi* v. [552] *Kanai Lal Mitter* (2), *Jugger Nath Samunt* v. *Odhiranee Narain Koomaree* (3); *Adhiranee Narain Coomaree* v. *Shona Malee* (4). Before the mother can succeed she must prove that the purchaser had notice that his vendor was acting in fraud of her rights. *Lakshman Ramchandra Joshi* v. *Sattyabhama Bai* (5). It may be said what is the remedy of the mother? Her right attaches to the purchase-money, which takes the place of the property sold. Mayne's Hindu Law, 5th Ed., p. 515. The case *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (6) will be cited against me, but that case is distinguishable. There the property was purchased *pendente lite* and s. 52 of the Transfer of Property Act applied. It was purchased after the partition suit had been instituted, *i.e.*, after the mother's right to a share had sprung up. Moreover, the point decided, is an *obiter dictum*.

Mr. *B. Chakravarti* on behalf of the Ghose defendants supported the argument of Mr. Mitter.

Mr. *H. D. Bose* on behalf of Nitomoni Dassee, widow of Chooni Lal, defendant.—The property in dispute is the only joint family property, and as soon as it ceases to exist as joint property the right of the mother to a share in lieu of maintenance arises. *Barahi Debi* v. *Debkamini Debi* (7). The case of *Jogendra Chunder Ghose* v. *Fulkumari Dasi* (6) fully supports my contention, and the point decided there is not an *obiter dictum*.

Cur. adv. vult.

JUDGMENT.

MARCH 20th: AMEER ALI, J.—This is a suit for partition. The plaintiff is a purchaser from one of the sons of Chooni Lal Mullick, who died in 1892, leaving four sons, Manick Lal Mullick, Gopessur Mullick, Johur Lal Mullick and Amrita Lal Mullick and a widow Sreemutty Nitomoni Dassee. He left a house No. 3/2 Gopal Chunder's Lane, the partition of which is sought in this suit, and it appears on the evidence that this is the only property he left. The share of Johur Lall Mullick has come to the [553] plaintiff Amrito Lall Mitter by virtue of a sale under a mortgage decree. The sale certificate has been put in. The share of Gopessur has come into the hands of the Ghose defendants under a sale certificate, which also has been put in. The plaintiff seeks to have a partition of the property, and his contention is that he is entitled to a one-fourth share, in spite of the fact that the widow of Chooni Lall Mullick is alive, and is entitled under the law to a share of the ancestral property upon a partition of the same among the sons of the original holders. The question has been argued with considerable ingenuity on behalf of the plaintiff and the Ghose defendants, and it has been suggested that the right of a mother to obtain a share upon partition comes into existence

(1) 15 C. 292 (312). (2) 8 B.L.R. 225. (3) 20 W.R. 126. (4) 1 C. 365.
(5) 2 B. 494. (6) 27 C. 77. (7) 20 C. 682.

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when the partition takes place among the sons; when a share is conveyed by the son to a purchaser the right of the mother does not follow that share. That, in substance, I understand to be the argument. But it is further contended that only in case of fraud on the part of a son, of which the purchaser has cognizance, any question relating to the share of the mother can arise. The effect of acceding to this contention would be to reduce the provision of the law, by which the mother becomes entitled to a share, to a nullity. Two cases were cited :—*Jugger Nath Samunt* v. *Odhiranee Narain Koomaree* (1), *Sorolah Dassee* v. *Bhoobun Mohun Neoghy* (2) in support of the contention. The passages to which I have been referred in those judgments, and which I am afraid have been somewhat strained to give colour to the argument must, in my opinion, be read with the facts with which the learned Judges were there dealing.

The case really in point is that of *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (3). Both Mr. B. C. Mitter and Mr. Chakravarti tried to argue that the views expressed by Banerjee, J., were mere *obiter dicta*. In my opinion, the dictum of a Judge of his learning and intimate knowledge of Hindu Law would have considerable weight even if it went beyond the requirements of the case itself, but I think the views expressed by the Chief Justice and Banerjee, J., are decisive on the point [554] and not merely *obiter dicta*. The learned Chief Justice points out that there were two points in the case:—

(1) Whether or not the purchaser from a Hindu son stands in the same position as the son himself.

(2) Whether in that particular case a transfer having been made after a partition suit, the purchaser was not bound.

The Chief Justice, as well as Banerjee, J., held on both these points against the very contention in this case. They first dealt with the general principle and then with the facts. The second point does not arise in the case before me. I have to deal with the first point only. I may say I have given the case my best consideration. I can only express my entire concurrence with the view of the law taken in *Jogendra Chunder Ghose* v. *Fulkumari Dassi*. To put it shortly in the language used by the learned Chief Justice, the position of a purchaser from a son is exactly that of a son himself. He has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased. And as a mother is entitled under the law to be maintained out of the joint family property, if any thing is done affecting that right, for instance by the sale of any particular share by any of her sons, her right comes into existence.

That being my view, I hold the plaintiff is entitled to a one-fifth share as purchaser from Johur Lall Mullick and the Ghose defendants to a one-fifth as purchasers of Gopessur's share, Manick and Amrito to a one-fifth each and Nitomoni to the remaining one-fifth for her life; after her death the sons and purchasers would be entitled to her share. I make a declaration to that effect and the usual decree for partition.

I do not think I will make any order as to costs.

Attorney for the plaintiff: Babu *Amar Nath Ghose.*

Attorney for the Ghose defendants: Mr. *A. C. Bose.*

Attorney for the mother: Babu *Charoo Chunder Bose.*

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(1) 20 W. R. 126. (2) 15 C. 292. (3) 27 C. 77.

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[555] ORIGINAL CIVIL.

Before Mr. Justice Ameer Ali.

MOKHODA DASSEE v. NUNDO LALL HALDAR AND OTHERS.*
[27th and 28th February and 2nd, 5th, 6th, 7th and 23rd March, 1900.]

Jurisdiction—Cause of action—Suit for maintenance—Letters Patent, 1865, *cl.* 12—*Hindu Law—Right of maintenance of a sonless widowed daughter in indigent circumstances out of properties inherited by the father's heirs.*

The plaintiff's father left various properties partly within and partly outside Calcutta. The plaintiff instituted this suit, as an indigent sonless widowed daughter, against the defendants for the recovery of her maintenance out of the estate inherited by them from her father, and prayed that her maintenance might be declared a charge upon the property situated within the limits of Calcutta.

Some of the defendants lived within and some outside Calcutta. Leave was obtained under cl. 12 of the Letters Patent. It was held that under the above-mentioned circumstances the High Court had jurisdiction to try the action.

A sonless widowed daughter in indigent circumstances is not entitled to separate maintenance out of the estate of her father in the hands of his heirs. The right would depend upon the fact, whether the widowed sonless daughter was at the time of her father's death maintained by him as a dependent member of his family with others whom he was legally or morally bound to maintain. The position of a sonless widowed daughter is not the same as that of a disqualified owner or disqualified heir.

Bai Mangal v. *Bai Rukhini* (1) referred to.

ONE Sambhu Chunder Haldar died many years ago, leaving three sons, named Jatadhari Haldar, Radhanath Haldar, and Dharmo Das Haldar. Thereafter, and in 1852, Dharmo Das Haldar died intestate leaving his widow Bidhumukhi Dassee, and the plaintiff, an unmarried daughter, him surviving A few years after her father's death the plaintiff was given away in marriage to Digambur Dutt by her paternal uncles. Digambur Dutt in or about the year 1879 predeceased his father Dino Nath Dutt (who was in fairly good circumstances during his lifetime) leaving him surviving the plaintiff, a sonless widow and four daughters, some of whom were then married, others unmarried. In 1868 Radhanath Haldar filed a suit in the Calcutta High Court for the [556] partition of the properties left by Sambhu Chunder Haldar. In the partition effected the said Bidhumukhi Dassee got the following property as representing her husband—(*a*) 70-1 Clive Street in Calcutta ; (*b*) Lands at Sulkea and Lilooah outside Calcutta. Bidhumukhi Dassee died in 1891, leaving Mokhoda Dassee, the plaintiff, as her daughter. The plaintiff was then a sonless widow.. After the death of Bidhumukhi Dassee, Radhanath Haldar brought a suit against the plaintiff, in which a decree was passed in his favour declaring him to be entitled to the property left by Dharmo Das Haldar and directing possession to be given to him thereof. In the decree that was passed leave was reserved to the plaintiff to bring a suit for her maintenance out of the estate of her father. Evidence was given in this case which went to show that Mokhoda Dassee since her marriage, and before the death of her husband, used generally to live with her husband at her father-in-law's house : and occasionally she used to live with her mother, the said Bidhumukhi Dassee. But after her husband's

* Original Civil Suit No. 690 of 1897.
(1) 23 B. 291.

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death she used to live permanently with her mother, the said Bidhumukhi Dassee. There was also evidence given to show that at the time of the marriage of the plaintiff her father-in-law was in fairly good circumstances. Radhanath Haldar died in 1895, leaving him surviving Nundo Lall Haldar, Shoshi Bhusan Haldar, Hera Lall Haldar, Nobo Kumar Haldar, Hriday Ram Haldar, his sons, and a grandson named Jotindra Mohun Haldar by a predeceased son Prasad Das Haldar. Mokhoda Dassee, the plaintiff, was in indigent circumstances, and she brought this suit against the sons and the grandson of Radhanath Haldar, the grandson being an infant under the age of eighteen years, for recovery of maintenance from them out of the estate inherited by them from their father. The defendants and their ancestors had a family dwelling-house in the district of Hooghly, and some of the defendants at the time of the suit lived in the family dwelling-house and some of them at Calcutta. Portions of the property inherited by the defendants were situated in Calcutta, and portions outside the limits of Calcutta. The plaintiff prayed in her plaint that her maintenance should be charged on the property situated within the limits of Calcutta, and at the time of the institution of the suit obtained leave to institute her suit in this Court. [557] The defendants mainly raised three contentions, *firstly*, that the High Court had no jurisdiction to try the suits; *secondly*, that the plaintiff was not in indigent circumstances; and *thirdly*, that, even if the plaintiff was in indigent circumstances, the plaintiff according to the Hindu law was not entitled to get any maintenance.

FEB. 27th, 28th; MAR. 2nd, 5th, 6th, 7th, 8th. Mr. *Sinha* (Mr. *B. C. Mitter* with him), for the minor defendant.—This Court has no jurisdiction to try this suit. Clause 12 of the Letters Patent enables this Court to try a suit (1) if it is a suit for land when the whole or part of it is situate within the local limits of the jurisdiction of this Court, provided that in the latter case leave to institute the suit has been obtained; (2) in any other case if the whole or part of the cause of action arises within such local limits, provided that in the latter case leave to institute the suit has been obtained; and (3) if the defendants reside or carry on business within the local limits of the jurisdiction of this Court.

This suit is not a suit for land. There is no question of title involved. *See Begram* v. *Moses* (1), *Delhi and London Bank* v. *Wardie* (2), *Kellie* v. *Fraser* (3).

No part of the cause of action arose within the local limits of the jurisdiction of this Court. The fact that the property, out of which maintenance is claimed, is within the jurisdiction, is immaterial; nor do all the defendants reside or carry on business within such jurisdiction. Only some of them do, but it has been held in *Hadlee Ismail* v. *Hadjee Mahomed* (4) that the word "defendants" in cl. 12 means *all* the defendants.

Mr. *W. C. Bonnerjee* (Mr. *B. Chakravarti* with him) for all defendants except the minor defendant on the same point.—The whole of the plaintiff's cause of action, if any, arose within the jurisdiction of the Court within the local limits of which the family dwelling-house of the defendants is situate. Before the [558] plaintiff can get any maintenance she must go and live as a dependent member of the family of the defendants. Her right is not analogous to that of a creditor whom, no doubt, the debtor has to seek out and pay the debt.

Mr. *R. Mittra* (Mr. *B. M. Chatterjee* with him), for the plaintiff, on the whole case.—This is a suit for land. The maintenance claimed is

(1) 1 Hyde, 284. (2) 1 C. 249. (3) 2 C. 445. (4) 13 B.L.R. 91.

sought to be declared a charge on land situated within the local limits of the jurisdiction of this Court. This involves a change in the title; *see Delhi and London Bank* v. *Wardie* (1). In any event, part of the cause of action arose within the jurisdiction of this Court. Cause of action means the whole bundle of facts which have to be proved before the plaintiff can succeed. Here, before the plaintiff can succeed, she must prove amongst others the following facts:—(1) That her father left property; (2) that that property has been inherited by, and is in the possession of, the defendants; and (3) that portion of that property is situate within the jurisdiction of this Court. Therefore part of the cause of action arises within the jurisdiction of this Court, *see Radha Bibee* v. *Mucksoodun* (2).

[AMEER ALI, J.—I will deal with the question of jurisdiction after hearing the whole case.]

An indigent sonless widowed daughter is entitled to maintenance from her father's heirs. Mayne's Hindu Law, s. 408, 2 Mac. Hindu Law, s. 118, and Vyvasta Darpana, 1867 Ed., p. 376. The plaintiff is a disqualified heir of her father and as such is entitled to maintenance. Her disqualification is the loss of her son at the time that the succession opened out.

There was a moral liability to maintain the plaintiff on the part of the father, and in his heirs that moral liability has developed into a legal liability, *see Kamini Dassee* v. *Chandra Pode Mundle* (3).

Mr. *W. C. Bonnerjee.*—The passage in Mayne's Hindu Law, s. 408, is based on the case mentioned in 2 Mac. Hindu Law, p. 118. The statement of the law there made is not correct. **[559]** No authority has been cited by the learned author and there is none in the Hindu Law. The argument that the plaintiff is a disqualified heir, and is therefore entitled to maintenance, is not sound. "Disqualified heir" has acquired a special meaning in Hindu Law. Its category is fixed. Women can inherit in Bengal only under special texts, see *Guru Gobind Saha's* case (4). The plaintiff was never the heir of her father, and there never was any moral obligation on his part to maintain her after her marriage. A daughter after her marriage ceases to belong to her father's family and is reborn as it were in the husband's family. See *West and Buhler's Hindu Law*, p. 129, *Janki* v. *Nand Ram* (5) at p. 209. There is no text in her favour in the Daybhaga or in Manu.

Mr. *B. C. Mitter.*—I support the arguments of Mr. Bonnerjee. In construing texts of Hindu Law one has to bear in mind that many of the texts are admonitory and not mandatory. The texts enjoining the head of the family to maintain the dependent members of the family are admonitory in their nature. *See Khetromoni* v. *Kasinath* (6). The only persons who are entitled to maintenance as of right are (1) the aged parents; (2) chaste wife; and (3) infant child.

Mr. *R. Mittra* in reply. After the argument of the case was over, Mr. Sinha drew the attention of the Court to *Bai Mangal* v. *Bai Rukmini* (7).

Cur. adv. vult.

JUDGMENT.

MARCH 23RD: AMEER ALI, J.—The plaintiff is the daughter of one Dharmo Dass, who died in the year 1852 or 1853. Besides the plaintiff, who was an infant at the time of his death, he left him surviving a widow

(1) 1 C. 95. (2) 21 W.R. 204. (3) 17 C. 373. (4) 5 B.L.R. 15.
(5) 11 A. 194 (209). (6) 2 B.L.R.A.C. 15. (7) 23 B. 291.

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named Bidhumukhi, and two brothers, Radhanath and Jatadhari. Subsequently upon a partition one-third of the joint estate was allotted to Bidhumukhi as the heiress of her husband. Jatadhari died, it appears, before Bidhumukhi. Bidhumukhi died on the 20th of October 1891, and under a decree in a suit brought by Radhanath Haldar against [560] the plaintiff he obtained possession of Dharmo Das' share which had devolved upon Bidhumukhi. The decree contained a declaration that it was without prejudice to any rights the plaintiff had to maintenance. The plaintiff Mokhoda was married to a man named Digambur Dutt, son of Dino Nath Dutt. Digambur died in his father's lifetime. The plaintiff had by him several daughters, and a son Jogendra. Unfortunately for her that son died during the lifetime of her mother, and the result was, as I have pointed out, that upon the death of Bidhumukhi the property was held to have passed to the brother of Dharmo Das and not to her, she being a sonless widowed daughter. She now brings this suit against the sons and grandsons of Radhanath Haldar, who has died since the decree, for maintenance out of the share which was of Dharmo Das in his lifetime. I should have thought that the people who took the property of Dharmo Das would have the generosity to make some provision for her, but in this country at times there is great liberality and kindliness of feeling; at other times equally great meanness; and the defendants have taken their stand on the Hindu Law; and it is by that law that I must decide this case. Whether it is harsh or otherwise it is not for me to determine.

This is the first case of its kind on this side of India. The only direct authority on the question requiring my determination is the case of *Bai Mangal* v. *Bai Rukmini* (1) decided in the Bombay High Court which is against the plaintiff. Before dealing with the legal rights of the parties, it is necessary I should state some of the facts on which the question of law turns. The plaintiff states she was married by her uncles and that after her marriage she occasionally lived at her husband's place and occasionally in her ancestral house which is at Sulkea. But as her evidence proceeded it appeared that after the partition her mother Bidhumukhi left Sulkea, and took up her abode at Jorasanko in her brother's house, and it is probable, as the plaintiff states, that, whilst her husband was alive, she lived occasionally with her mother, and it is more than probable that after her husband's death she lived altogether with her mother.

[561] Dino Nath Dutt, her father-in-law, was, upon the evidence, a man in fairly good circumstances, and possessed of some property which has come into the hands of one of his grandsons, Tulsi Das, who gave his testimony in this case. I have no doubt that Mokhoda is in destitute circumstances; she is living now in a house belonging to her deceased son-in-law Purna Cunder Daw, who has provided by his will that its rent should be paid out of his estate. The evidence regarding her other means shows that she is at present maintaining herself by borrowing. It was attempted by Mr. Bonnerjee to prove that a will was left by Dino Nath Dutt, under which Mokhoda Dassee was to get Rs. 5 a month for her maintenance, in case she resided in the family dwelling-house, but did not choose to mess with the family.

This attempt was made for the purpose of showing that the plaintiff could not be said to be in destitute circumstances. I was of opinion then, and am of that opinion still, that that evidence is irrelevant. The question,

(1) 23 B. 291.

which I have to try, is the *present* indigence of the plaintiff, and the fact that she may possibly be entitled to get something monthly under a will, which has never been propounded, is not relevant to the inquiry before me. Another contention raised on behalf of the defendant was that this case is not within the jurisdiction of this Court, but ought to have been instituted in the Mofussil. I held against that contention, and I now proceed to give my reasons.

The plaintiff's cause of action is based on a variety of circumstances; those circumstances constituted the cause of action giving her the right to sue. Her right is founded upon the fact that her father left various properties partly within and partly outside Calcutta, and that inasmuch as he left certain property which came into the hands of the defendants, she, as an indigent sonless widowed daughter, was entitled to maintenance. Her allegations, and the facts upon which she bases her right to sue, bring the suit strictly, as I understand it, within the meaning of cl. 12 of the Charter. I hold that the Court has jurisdiction to try the action.

I now proceed to discuss the law bearing on the subject. As I understand the Hindu Law, the right of a woman to succeed to property is founded upon distinct textual authority. The [562] Hindu Law, like most of the older systems, regulates the devolution of property upon the basis of a spiritual benefit likely to be conferred upon the last owner. It excludes from inheritance or rather disqualifies from inheriting males who are not in a position to confer a spiritual benefit upon the deceased proprietor; and with the exception of one school the other schools of law generally exclude females from inheritance on the same ground. Under the Dayabhaga alone women are entitled to succeed under certain circumstances. Putting aside the case of a widow, the law declares that in case the owner dies without leaving any male issue, the unmarried daughter who is most likely to give birth to a son, or a married daughter, whose husband is alive and who is not past child-bearing, or a daughter with sons, should take the property. I am not prepared to agree with the contention of the learned counsel for the plaintiff, who argued this case with great ability, that the position of a sonless widowed daughter is the same as that of a disqualified owner or disqualified heir. As I understand the Hindu Law, the position of a male who has been disqualified from inheriting by any defect inherent in himself is totally different from the disqualification attached to a female, who does not possess the requisite condition for taking the property. Her right is dependent upon the fact that she has male issue or is likely to have male issue, who can perform those spiritual services considered so necessary in the Hindu system.

But then arises the broad question raised by Mr. Mitter, and raised very moderately and discussed with considerable ingenuity, whether or not a daughter, in indigent circumstances and not able to get any maintenance from the father-in-law's family, is entitled to look for her maintenance from the share that was of her father's. This brings me to the consideration of the question as to the status of a married daughter in a Hindu family. Again, speaking with reserve, so far as I understand the Hindu Law, marriage, ordinarily speaking, detaches the status of a Hindu girl from the parental family, and attaches it, if I may so use the expression, to the family of the husband or of the husband's father, and it will be seen from the text that this view is not unsupported by the law. So long as the daughter is unmarried, there is a distinct obligation on the [563] father to maintain her, an obligation of a moral character so far as the father is concerned, which ripens into a legal obligation the moment the property

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comes into the hands of somebody else, and, if the daughter is unmarried, the law declares her entitled to a certain proportion of the estate for her maintenance. Once married, the obligation which rested upon the father or the father's family seems to cease, and that is not peculiar to the Hindu Law. But, as I said before, this is ordinarily the case. There may be cases, however, where a father maintains the daughter and the daughter's husband in his own house, and does so up to the end of his life. Under those circumstances the fact of his marrying her to a person not possessed of means to maintain his wife would cast upon him the moral obligation of maintaining both her and her husband, and in the case of a widowed daughter of maintaining her and her children. If that moral obligation rested upon him in his lifetime, upon his death the moral obligation would, in my opinion, become a legal obligation on the part of those taking his property.

On this point I would quote the words of Mr. Justice Banerjee in *Kamini Dassee* v. *Chandra Pode Mondle* (1) which was the case of a daughter-in-law. That learned Judge says: "In each case it will have to be determined whether having regard to the relationship, the means and various other circumstances of the party claiming maintenance, the late proprietor was, according to the principles of Hindu Law and to the usages and practices of the Hindu people, morally bound to maintain that party." These words indicate exactly the various circumstances which have to be taken into consideration in dealing with each particular case. Speaking with respect I am inclined to think the case in the Bombay High Court went too far. I will explain my reasons later on. I propose first to refer shortly to the authorities on which the learned counsel for the plaintiff relied. His contention was principally based upon the words of Mr. Mayne at the end of para. 408, where it is said as follows: "After marriage, her (meaning the daughter's) maintenance is a charge upon her husband's family, but, if they are unable to support her, she must be provided for by the family of her father."

[564] Mr. Justice Ranade in the Bombay High Court has examined Mr. Mayne's statement of the law and he considers that it is not borne out by the authorities referred to by the learned author. I have also examined those authorities and am inclined to agree with Mr. Justice Ranade that the text which speaks of the maintenance of widowed sonless daughters and other people in the same position seems to be of a monetary character rather than laying down any general legal obligation. Unless therefore I can find that Mokhoda Dassee continued after her marriage to be a member of her father's family so as to cast upon him a moral obligation of maintaining her, the law, in my opinion, would preclude her from asking for maintenance out of her father's share.

Mr. Justice Ranade, after examining all the authorities, has broadly laid down in p. 295 the law as he understood it. "In fact," he says "all the text-writers appear to be in agreement on this point, namely, that it is only the unmarried daughters who have a legal claim for maintenance. The married daughters must seek their maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs." As I said before I am inclined to add a qualification to this enunciation of the law.

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(1) 17 C. 373.

In my opinion the right would depend upon the fact whether the widowed sonless daughter was at the time of her father's death maintained by him as a dependent member of his family with others whom he was legally or morally bound to maintain. 1900 MARCH 23. — ORIGINAL CIVIL. — 27 C. 555 = 4 C.W.N. 669.

I am sorry upon the evidence I cannot come to that conclusion. The husband does not appear to have lived in the house of Mokhoda's father. Digambur was possessed of sufficient means, and there is no reason to suppose that after Mokhoda's marriage, Bidhumukhi, or the paternal relatives of the plaintiff, undertook the obligation of supporting her. She may have come to the house of her mother and resided there for long periods, but that does not, in my opinion, alter the position or obligation of the husband's family. Tulsi Das is willing to maintain her, if she goes back to the family house. Whether [565] that offer was *bona fide* or not is a different question. There is the offer on his part and I cannot lose sight of that fact.

Again, I find no authority laying down that when a widowed sonless daughter is in indigent circumstances, she is entitled to separate maintenance, without any further cause.

For all these reasons, however much I may pity the plaintiff, I feel bound to dismiss her suit. Considering, however, this is the first case of its kind on this side of India and considering also the surrounding circumstances, I think I ought not to give any costs.

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27 C. 565.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

RAM KRISHNA BISWAS (*Petitioner*) v. MOHENDRA NATH MOZUMDAR (*Opposite party*).* [2nd March, 1900.]

Daily payment of fine, order of—Illegality of such order.

An order for payment of a daily fine is illegal inasmuch as it is an adjudication in respect of an offence which has not been committed when such order is passed.

Sagar Dutt (1), *W.N. Love* (2), and *Kristodhone Dutt* v. *Chairman of the Municipal Commissioners of the Suburbs of Calcutta* (3), referred to.

[F., 24 A. 309 (311) = 22 A.W.N. 70; Expl., 7 C.W.N. 853 (858).]

IN this case the petitioner was found guilty under bye-law 18 of the Nuddia District Board of having made certain constructions on road land in that district subsequent to the passing of the bye-law, which constructions were encroachments within its provisions, and was sentenced to pay a fine of Rs. 25 and a further fine of Re. 1 for every day during which the offence was continued and the encroachments not removed.

[566] Babu *Hem Chunder Chakravarti*, for the petitioner.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

The petitioner has been required under a rule of the District Board of Nuddia having the force of law and on conviction of an offence within

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* Criminal Revision No. 64 of 1900, made against the order passed by Mohesh Chunder Sen, Deputy Magistrate of Krishnagore, dated the 29th of December 1899.

(1) 1 B.L.R.O.Cr. 41. (2) 18 W.R.Cr. 44. (3) 25 W.R.Cr. 6.

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its terms to pay a daily fine of one rupee, until the encroachment constituting the offence shall have been removed.

A rule has been granted to consider the order regarding the daily fine. There are several reported cases of this Court on the subject, and it has been held that an order for payment of a daily fine is illegal, inasmuch as it is an adjudication in respect of an offence which had not been committed when such order was passed. We may refer to the case of *Sagar Dutt* (1) as well as to the cases of *W. N. Love* (2) and of *Kristodhone Dutt* v. *Chairman of the Municipal Commissioners of the Suburbs of Calcutta* (3) as authorities for this. We do not propose to follow the case of *Sagar Dutt* in which the order was passed under a special Act in regard to the setting aside of an order of fine for an offence actually committed. The order of the daily fine is set aside and the rule made absolute.

D. S. *Rule made absolute.*

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27 C. 566=4 C.W.N. 546.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

ABHI MISSER AND OTHERS (*Petitioners*) *v.* LACHMI NARAIN (*Opposite party*).* [6th March, 1900.]

Rioting, acquittal of—Conviction of grievous hurt—Constructive guilt—Abetment—Penal Code (Act XLV of 1860), *ss.* 114, 525, *with* 149.

Where the accused persons have been acquitted of rioting, they cannot be properly convicted of grievous hurt under s. 325 by the application of s. 149 of the Penal Code, where it has not been found that these persons or any of them were members of an unlawful assembly in [567] prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or that the offence was such as each member of that assembly knew to be likely to be committed in prosecution of that object.

The mere presence as an abettor of any person would not, under the terms of s. 114 of the Penal Code, render him liable for the offence committed.—*Empress* v. *Chatradhari Goala* (4) explained.

In order to bring a person within s. 114 of the Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that if absent, he would have been liable to be punished as an abettor, and then to show that he was also present when the offence was committed.—*Queen* v. *Mussamut Niruni* (5) relied on.

[F., 8 C.W.N. 519 (521); R., 34 M. 545 (546)=11 Cr.L.J. 534=7 Ind. Cas. 861=8 M.L.T. 313=(1911) 1 M.W.N. 474.]

IN this case the accused persons were convicted by the Joint-Magistrate of Tirhut under ss. 148, 225 and 353 read with s. 149 of the Penal Code, and sentenced to one month's rigorous imprisonment under each of those sections. These offences related to the rescue of one Dhanuk from lawful custody of the police, who, in discharge of their duty, arrested him as they alleged for an offence under s. 325 of the Penal Code. The accused were also convicted by the said Joint-Magistrate under s. 325 of the Penal Code for having together assaulted the Sub-Inspector and caused him grievous hurt; this was in the pursuit after the escape of Dhanuk. On

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* Criminal Revision Nos. 9 and 130 of 1900, made against the order passed by A.E. Staley, Esq., Sessions Judge of Tirhut, dated the 13th of January 1900.

(1) 1 B. L. R. O. Cr. 41. (2) 18 W. R. Cr. 44. (3) 25 W. R. Cr. 6.
(4) 2 C.W.N. 49. (5) 7 W.R.Cr. 49.

appeal the Sessions Judge of Tirhut acquitted the accused of all the offences except one. The Sessions Judge referred the matter to the High Court in revision for the enhancement of the sentences so remaining, namely, one month's rigorous imprisonment in reference to each of the accused as he considered the sentence inadequate. It was not clear from the terms of the Sessions Judge's judgment, whether he affirmed the conviction of the offence as under s. 325, read with s. 149 of the Penal Code, or under s. 114, of abetment of an offence under s. 325 of the Penal Code. The letter of reference with regard to this point was as follows: "I may notice here that the appellants have been convicted under s. 325 with s. 149 of the Penal Code, the common object of their assembly not being stated in this charge. It was not, however, [568] in order to make the appellants liable together, necessary to charge the appellants under s. 149 of the Penal Code. If they all joined together to beat the Sub-Inspector so as to cause him grievous hurt, all would, by the provisions of s. 114 of the Penal Code, be guilty of an offence under s. 325 of the Penal Code.—*Empress* v. *Chatradhari Goala* (1). Shortly afterwards the accused applied to the High Court, and obtained a rule to consider whether the conviction and sentences could be sustained on the findings of the lower Courts. Both matters were considered simultaneously by the High Court.

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Mr. *P. L. Roy*, with him Babu *Dasarathi Sanyal* and Babu *Buldeo Narain Singh*, for the petitioners.

Babu *Shrish Chunder Chowdhry*, for the Crown.

JUDGMENT.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows:—The five persons concerned in the matter before us were convicted by the Magistrate of various offences under the Penal Code, and sentenced to separate sentences of one month's rigorous imprisonment for each of such offences. On appeal to the Sessions Judge, all these persons have been acquitted of every offence except one. It is not clear from the terms of the Sessions Judge's judgment, whether he affirmed the conviction of this offence as under s. 325 read with s. 149 of the Penal Code, or under s. 114 of abetment of an offence under s. 325. But we are inclined to think that he convicted the persons now before us of the last-mentioned offence. The Sessions Judge, after dealing with the appeals in this manner, referred the matter to this Court in revision for enhancement of the sentences so remaining, that is, of rigorous imprisonment for one month in reference to each of these persons, because he considered that these sentences were inadequate, having regard to the acts of which the accused had been found guilty.

Shortly afterwards these persons applied to us and obtained a rule, the object of which was to consider whether the conviction [569] and sentences could be sustained on the findings of the lower Courts.

Both these matters have been considered by us simultaneously. There can be no doubt that the petitioners having been acquitted of rioting, could not be properly convicted of grievous hurt under s. 325 by the application of s. 149 of the Penal Code, for it was not found that these persons or any one of them were members of an unlawful assembly in prosecution of the common object, of which grievous hurt was caused by any other member of the same assembly, or that the offence was such as each

(1) 2 C.W.N. 49.

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member of that assembly knew to be likely to be committed in prosecution of that object. So far, therefore, if the conviction be considered to be under s. 325 and s. 149 of the Penal Code, it is bad. But we are inclined to think, from the concluding terms of the Sessions Judge's judgment, that he intended to convict these persons of abetment, as described in s. 114 of the Penal Code, of an offence under s. 325, for he quotes as authority for this *Empress* v. *Chatradhari Goala* (1). The finding of the Sessions Judge is, that "if the accused all joined together to beat the Sub-Inspector, so as to cause him grievous hurt, all would, by the provisions of s. 114 of the Penal Code, be guilty of an offence under s. 325." We have referred to the learned Judges who passed the judgment reported in *Empress* v. *Chatradhari Goala* (1) on which the Sessions Judge relies, and we are authorized by them to state that it was not intended to declare that the mere presence as an abettor of any person would, under the terms of s. 114, render him liable for the offence committed, and it has been explained that in that case it was found that the abetment had been committed before the actual presence of the accused at the commission of the offence abetted: This judgment, therefore, is no authority for the finding of the Sessions Judge. We think that the law has been properly expressed in the case of *Queen* v. *Mussamut Niruni and another* (2) in which it was held that to bring a prisoner within s. 114 of the [570] Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that 'if absent,' he would have been 'liable to be punished as an abettor ;' and then to shew that he was also present when the offence was committed." Under such circumstances, we think that the conviction and sentence passed by the Magistrate and confirmed by the Sessions Judge should be set aside, and it follows that the order under s. 106 of the Code of Criminal Procedure requiring them to give security to keep the peace becomes null and void.

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27 C. 570 = 4 C.W.N. 210.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

ISMAIL KHAN MAHOMED (*Plaintiff, Appellant*) *v.* JAIGUN BIBI (*Defendant, Respondent*).*

[21st and 22nd December, 1899 and 9th, 10th, 11th and 19th January, 1900.]

Landlord and tenant—Suit for ejectment—Notice to quit—Tenancy created by a kabuliyat *—Six months' notice requiring the tenant to vacate the holding before the expiry of the last day of the year, whether good—Presumption as to a tenancy being a permanent one—Long possession, transfers of the holding and erection of* pucca *building, whether sufficient for a presumption that the tenancy is a permanent one—Compensation on ejectment—Transfer of Property Act (IV of* 1882*), ss.* 51 *and* 108 (*cl. h*).

In a tenancy created by a *kabuliyat* with an annual rent reserved, a six month's notice to quit requiring the tenant to vacate the holding within, instead of on the expiry of the last day of a year of the tenancy, is a good notice in law, inasmuch as there was no appreciable interval between the expiry of the notice and the end of a year of the tenancy.

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* Appeal from Original Decree No. 163 of 1898, against the decree of Babu Bulloram Mullick, Subordinate Judge of 24-Pergunnahs, dated the 17th of February 1898.

(1) 2 C.W.N. 49. (2) 7 W. R. Cr. 49.

Page v. *More* (1) distinguished.

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Where a tenancy was created by a *kabuliyat*, which on the face of it contained nothing to imply permanency in the tenure created, which contained no words of inheritance, nor anything to show that the land was taken for residential or building purposes; where though the land passed by successive transfers, there was nothing to show that the landlord had knowledge of them or registered the transferee as tenant; where though there were *pucca* [571] buildings on the land, they had not been in existence for such a length of time as would warrant an inference that the lease was one for building purposes; where there was nothing to show that they were erected under circumstances from which acquiescence of the landlord and the creation of an equitable right in the tenant could be inferred; or that they were erected with the knowledge of the landlord; such facts are not sufficient to warrant an inference that the tenancy was, when first created, intended to be permanent, or was subsequently by implied agreement converted into a permanent one.

To resist ejectment by a tenant on the ground that the tenancy is a permanent one, and that the landlord stood by and permitted him (the tenant) to erect *pucca* buildings on the land in the belief that the said tenancy was a permanent one, it is incumbent on the tenant to show that in erecting the buildings he was acting under an honest belief that he had a permanent right in the land, and the landlord knowing that he (the tenant) was acting under such belief stood by and allowed him to go on with the construction of the buildings.

Lala Beniram v. *Kundan Lal* (2), *Ramsden* v. *Dyson* (3), *Jugmohan Das* v. *Pallonjee* (4), *De Busche* v. *Alt* (5), *Kunhamed* v. *Narayanan Mussad* (6), referred to.

Where it is proved that the tenancy is not a permanent one, that the tenant erected a *pucca* building on the land without the consent of the landlord, the tenant on eviction is not entitled to any compensation for the building from the landlord.

Dattatraya Rayaji Pai v. *Shridhar Narayan Pai* (7), *Yeshwada* v. *Ram Chandra* (8), distinguished.

[F., 5 C.W.N. 846 (856, 858); 11 Ind. Cas. 745 = 21 M.L.J. 891 (908) = 10 M.L.T. 193; Rel., 32 C. 648 (651) = 9 C.W.N. 463; Appl., 6 C.W.N. 352 (353); R., 28 C. 738 (743) = 5 C.W.N. 858; 27 M. 211 (218) = 14 M.L.J. 25; 8 C.W.N. 235 (237); 9 C.W.N. 60 (62); 37 M. 1 = (1910) M.W.N. 369 = 8 M.L.T. 258 = 7 Ind. Cas. 202 (208); 13 C.W.N. 931 = 3 Ind. Cas. 415; D. & N. Appl., 5 Ind. Cas. 699 (700) = 6 N.L.R. 17; D., 8 C.W.N. 301 (304).]

THIS appeal arose out of an action for ejectment brought by the plaintiff-lessee of a certain *taluq* against the defendant-tenant. The allegation of the plaintiff was that *taluq* Toujee No. 92 in the District of 24-Pergunnahs was *wakf* property; that the Mutwalli of the said estate on the 5th of November 1895, granted to the plaintiff a lease for a term of ten years; that under the term of the lease he was entitled to sue the defendant for ejectment on giving proper notice—the defendant was a tenant-at-will; that a notice in writing was given to the defendant on the 20th Aswin 1302 [572] B. S. requiring him to quit the land by the last day of Chait 1302 B. S. and that the defendant did not comply with the said notice. The plaintiff also claimed rent up to 1302 B.S. The defence was that the defendant did not know that the *taluq* No. 92 was *wakf* or endowed property; that the defendant was not a tenant at will; that the notice was bad in law; that the land in dispute was part of an ancient *mourasi mocorari* holding of Nizam Mistry, and was purchased by Shadhu Serang in 1256 B.S. from one Golam Kadir, who had obtained the greater part of that holding under a compromise decree against Nizam Mistry's widow; that Shadhu Serang built a *pucca* building on the land, whose heirs, having been in possession of the said land and building, on the

(1) (1850) 15 Q.B. 684.
(2) L.R. 26 I.A. 58.
(3) (1866) L.R. 1 Eng. Irish. App. 129.
(4) 22 B. 1.
(5) (1877) L.R. 8 Ch. Div. 286.
(6) 12 M. 320.
(7) 17 B. 736.
(8) 18 B. 66.

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16th Aswin 1271 B. S. sold the same to the defendant's ancestors, who having got possession continued to pay rent at the old fixed rate; that on the 28th Aghran 1275 B.S., there was a partition made between this defendant's father and her uncle's heirs; that this defendant got the land and building in suit on partition and built another *pucca* building on the southern side,and had been holding the said land as a permanent tenure on payment of a fixed rent of Rs. 2-11-8; that according to the local custom of *taluq* Khidirpur all homestead lands were alienable *mourasi mocorari tenures.* It appeared from the evidence that the original holding was one of 14 bighas and 5 cottahs which stood in the name of one Nizam Mistry, but there was no evidence to show as to the nature of the tenancy in its inception. Shadhu Serang having purchased a portion of the holding from one Golam Kadir by a conveyance, dated the 17th Pous 1256 B.S., which also did not show the nature of tenancy, obtained a settlement of the land in dispute at a rent of Rs. 2-11-0 from the landlord, and executed a *kabuliyat* on the 19th Chait 1257 which was in the following terms:—

"In mouzah Kidderpore, pergunnah Kismat Magura, within your jurisdiction, out of 4 bighas and 5 cottahs of land of late Nizam Mistry, his widow Bibi Begum having, on the strength of the decree No. 4088 and decree in terms of *solenamah* in appeal No. 34, received 12 cottahs of land. Golam Kadir has obtained the remaining 3 bighas and 13 cottahs of land (the rent of which is Company's Rs. 14-3-1), and he is in possession of it. Out of this, in respect of 14 cottahs of rent-paying land, the fixtures and structures upon which have been purchased by me on measurement of the area thereof, according to the relinquishment given under the signature of my vendor the [573] said Golam Kadir the 17th Pous 1256 B.S., and to the petition made by me under my signature of 31st Sravan of the said year, I take a settlement on a *jama* of Rs. 2-11-8 a year on payment of the rent into your *sarkar* by proper instalments regularly every year, and on keeping the boundaries intact as before I shall continue to hold and enjoy without any anxiety; I shall not be able to raise any objection on the ground of any deficit in the quantity of land on measurement or of any encroachment by the road. To this effect I, of my own free will and on receipt of Pottah, execute this *kabuliyat* of the rent-paying land."

It did dot appear from the evidence that the buildings, although one of them was built 40 years ago, and the other 25 years ago, were built with the knowledge and consent of the landlord. There was no recognition of the transfers of the tenure by mutation of the name of the transferees by the landlord except by receipt of rent from them.

The Court below overruled the objection of the defendant as to the notice, but dismissed the suit for ejectment on the ground that the defendant had a permanent right on the land and gave the defendant a decree for arrears of rent only. From this decision the plaintiff appealed to the High Court.

DEC. 21st, 22nd and JAN. 9th, 10th, 11th.—The *Advocate-General* (Moulvi *Syed Shamsul Huda*, Moulvi *Mahomed Sawgat Ali*, and Babu *Charu Chunder Ghose* with him), for the appellant.—The Court below was wrong in not allowing a decree for ejectment, inasmuch as the defendant is a tenant-at-will. The tenancy was created by a *kabuliyat* which did not show or did not contain any words by which it could be presumed that the tenancy was a permanent one. The fact that there were successive transfers of the holding and that the tenant erected *pucca* buildings on it in

the absence of acquiescence or consent on the part of the landlord, are not sufficient to raise such a presumption. The buildings were not erected on the land for such a length of time as would warrant an inference that the lease was created for building purposes. All the time the land in dispute was held by *ijaradars*, and there was nothing to show that the buildings were erected with the knowledge of the landlord. The landlord is not estopped from bringing a suit to eject a tenant simply because the latter erected *pucca* buildings on the land. In order to raise an equitable estoppel against the landlord precluding him from [574] suing for possession the tenant should show facts sufficient to justify the legal inference that the landlord had by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. See *Beniram* v. *Kundan Lal* (1). See also the cases of *Ramsden* v. *Dyson*(2), *Naunihal Bhagat* v. *Rameshar Bhagat*(3), *Jugmohan Das* v. *Pallonjee* (4), *Nabu Mondul* v. *Chalim Mullick* (5). In this case it may be observed that the lease was granted by a *mutwalli*, who had not the power to grant a permanent lease, and his position is like that of a *Shebayet*. See *Shoojat Ali* v. *Zumeeruddeen* (6), *Prosunno Kumari Debya* v. *Golab Chand*(7), *Doorga Nath Roy* v. *Ram Chunder Sen*(8). The landlord's interest having been let out in *ijara* at the time when the buildings were erected, the presumption as to the tenancy being a permanent one could not arise. See *Krishna Kishore Neogi* v. *Nur Mohamed Ali* (9). The erection of the buildings might be in the nature of an assertion of adverse possession as against the *ijaradar*, but the interest of the landlord could not be affected in any way thereby.

Mr. *C. P. Hill* (Mr. *S. J. Mirza*, Babu *Romesh Chunder Bose*, Dr. *Rash Behary Ghose*, Babu *Umakali Mookerjee*, Moulvi *Mahomed Mustapha Khan*, Babu *Bhugaban Chunder Mookerjee*, and Babu *Nilmoni Mookerjee* with him), for the respondent.— The tenancy was not created by the *kabuliyat* of 1257, but arose from the sub-division of an old tenancy. The erection of *pucca* buildings, successive transfers, and long possession of the land are facts sufficient to raise a presumption that the lease was one for building purposes and that the tenancy was a permanent one. A payment of rent from year to year cannot be held to be a presumption against the tenancy being [575] a permanent tenancy. See the cases of *Dhunput Singh* v. *Gooman Singh* (10), *Robert Watson & Co.* v. *Mohesh Narayan Roy*(11), *Beni Madhub Banerjee* v. *Jai Krishna Mookerjee* (12), *Prossunno Coomar Chatterjee* v. *Jagunnath Bysack* (13), *Juhooree* v. *Dear*(14), *Gungadhur* v. *Ayimuddin*(15). The *kabuliyat* relied upon by the other side did not create a new tenancy; the pottah granted was a confirmatory one, and the incidents of the old tenure existed, the case of *Beniram* v. *Kundan Lal*(1) is distinguishable as the lease granted in that case was for a term of years. The landlord, it appeared, was aware of the erection of the buildings, and they having stood by for so long a time they are estopped from pleading that the tenancy was not created for building purposes, and that it was not a permanent one. If the tenancy is held not to be a permanent one, then the tenant on eviction is entitled to compensation. See *Thakur Chander* v. *Ramdhone* (16), *Dattatraya Rayaji Pai* v. *Shridhar Narayan Pai*(17), *Yeshwada* v. *Ram Chandra* (18).

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(1) 21 A. 496=26 I.A. 58. (2) (1866) L.R. 1 Eng. & Irish App. 129. (3) 16 A. 328. (4) 22 B. 1. (5) 25 C. 896. (6) 5 W.R. 158. (7) 2 I.A. 145. (8) 2 C. 341. (9) 3 C.W.N. 255. (10) 9 W R. P C. 3. (11) 24 W.R 176. (12) 7 B.L.R. 152. (13) 10 C.L.R. 25. (14) 23 W.R. 399. (15) 8 C. 960. (16) 6 W.R. 228. (17) 17 B. 736. (18) 18 B. 66.

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Dr. *Rash Behary Ghose*, who followed on the same side. The notice to quit is bad in law inasmuch as it required the tenant to quit the land within the last day of a year of the tenancy. See the cases of *Page* v. *More* (1), *Kishori* v. *Nund* (2). The land having been let out in *ijarah* made no difference as the landlord was aware of the erection of the buildings, and that the *ijaradar* was but an agent of the landlord.

The *Advocate-General* in reply.

Cur. adv. vult.

JAN. 19th. Their Lordships (BANERJEE and STEVENS, JJ.) delivered the following

JUDGMENT.

[576] This appeal arises out of a suit brought by the plaintiff-appellant, for ejectment of the defendant-respondent from a plot of land, and for arrears of rent, on the allegation, that the plaintiff is lessee of *taluq* No. 99 on the register of 24-Pergunnahs Collectorate under the *mutwali* or, manager of the Hughli Imambara, who holds that *taluq* as trustee of the endowment; that the defendant in possession of the plot of land in dispute is a tenant-at-will under the plaintiff; that the plaintiff gave the defendant as he is entitled by his lease to do, a notice to quit the land in suit; and that the defendant has not complied with the notice.

The defence was that the defendant knew nothing of the *taluq* No. 92 being *wakf* or endowed property; that the defendant was not a tenant-at-will; that the notice was bad in law; that the land in dispute was part of an ancient *mourasi mocorari* holding of Nizam Mistry and was purchased by Shadhu Serang in 1256 from Gholam Kadir who had obtained the greater part of that holding under a compromise decree against Nazim Mistry's widow; that Shadhu Serang erected a *pucca* building on the land, that the land with the building has, by successive transfers, come to the hands of the defendant, who has built another *pucca* house on the land and has been holding the same as a permanent tenure on payment of the fixed rent of Rs. 2-11-8; and that by the local custom of *taluq* Kidderpore tenants of homestead lands have permanent rights in the same.

The Court below overruled the objection to the notice, but dismissed the suit for ejectment on the ground that the defendant had a permanent right to the land, and it gave the plaintiff a decree only for arrears of rent.

Against that decree the plaintiff has preferred this appeal and it is contended on his behalf that the Court below was wrong in holding that the defendant has a permanent right in the land. On the other hand the defendant seeks to support the decree of the Court below dismissing the suit, not only on the ground on which it is based, but also on the ground that the notice to quit was bad in law; and it is further contended on her behalf that even if the notice be good and she be found not to have any permanent right, the plaintiff cannot eject her without **[577]** giving her sufficient compensation for the value of the buildings standing on the land.

The points, therefore, that arise for determination in this appeal are:

First—Whether the notice to quit is a good notice;

Second—Whether the tenancy of the defendant is a permanent one; and

Third—Whether in the event of the first two points being decided against the defendant, she is entitled to any compensation.

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(1) (1850) 15 Q. B. 684. (2) 24 C. 720.

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On the first point, it is argued for the defendant-respondent, that if her tenancy be not a permanent one, it must at least be a tenancy from year to year, and the notice to quit must, as has been held in *Kishori Mohun Roy* v. *Nund Kumar Ghoshal* (1), be a six months' notice expiring with the end of a year of the tenancy; and as the tenancy is said to have been created by the *kabuliyat* (1), Ex. III, dated the 19th Chait 1257, and the notice was served on the 23rd of Ashwin 1303 and expired on the last day of Chait of that year, it did not expire with the end of a year of the tenancy, and was therefore a bad notice. We do not consider this argument valid. For though the tenancy was, as appears on the face of Ex. III, created by that document, and the document is dated the 19th of Chait, rent has all along been paid, as is clear from the rent receipts filed (see in particular Ex. A for 1300 and Exs. D and DD for 1257) according to the ordinary Bengali year, so that a year of the tenancy would be the ordinary Bengali year. But then it is contended for the respondent that the notice would still be bad, as it does not expire with the end of the Bengali year but requires the tenant to vacate the holding before the expiry of the last day of Chait which is the last day of the Bengali year; and in support of this contention the case of *Page* v. *More* (2) is cited. We are of opinion that the contention is untenable, and that the case cited is distinguishable from the present. In that case the notice required the tenant to quit on the proper day at noon, so **[578]** that there was an appreciable interval between the expiry of the notice and the end of a year of the tenancy. Here the notice required the tenant to quit before the expiry of the last day of the Bengali year, that is a year of the tenancy, so that there was no appreciable interval between the expiry of the notice and end of a year of the tenancy. To say that the notice here is bad because it required the tenant to quit *before* instead of *on* the expiry of the last day of Chait, would be to indulge in subtleties which, as Lord Justice Lindley observed in *Sidebotham* v. *Holland* (3) "ought to be and are disregarded as out of place."

The first point must, therefore, be determined in favour of the plaintiff-appellant.

On the second point it is argued for the appellant that the tenancy was created by the *kabuliyat* Ex. III (1) which contains no words of inheritance, nor anything to show that the land was taken for residential or building purposes from which a permanent tenancy could be presumed; that though the land has passed by successive transfers, there is nothing to show that the lessor had knowledge of them, or registered the transferee as tenant; and that though there are *pucca* buildings on the land, they have not been in existence for such a length of time as would warrant an inference that the lease was one for building purposes, nor are they shown to have been erected under circumstances from which acquiescence of the landlord and the creation of any equitable right in the tenant to resist eviction can be inferred. And it is further argued that the fact of the lessor being, as is shown by the *kabuliyat* itself, a *mutwali* or manager of *wakf* or *endowed* property who has no power to grant any permanent lease, and of the estate being held by *ijaradars*, would prevent the inference of any permanent grant, or the creation of any permanent right by acquiescence. And the cases of *Lala Beniram* v. *Kundan Lal* (4), *Krishna Kishore Neogi* v. *Mir Mohamad Ali* (5)

(1) 24 C. 720. (2) (1850) 15 Q. B. 684. (3) (1894) L. R. 1 Q. B. 378.
(4) 26 I.A. 58. (5) 3 C. W. N. 255.

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Shoojat Ali v. *Zumeeruddeen* (1) and [579] various other cases are cited in support of the argument. On the other hand, it is argued for the respondent that the tenancy was not created by the lease of 1257 but arose from the subdivision of an old tenancy in the name of Nizam Mistri ; that from long possession and numerous transfers of the land, and the existence of *pucca* buildings on it, the lease should be presumed to have been one for building purposes and therefore permanent; and that the contention that no such presumption could arise by reason of the limited character of the lessor's right could not be raised in appeal when it was not raised in the first Court, and even if it could be raised, it was not substantiated by evidence. And in support of this argument *Dhunput Singh* v. *Gooman Singh* (2), *Robert Watson & Co.* v. *Mohesh Narayan Roy* (3), *Beni Madhab Banerjee* v. *Joy Krishna Mukerjee* (4), *Prossunno Coomar Chatterjee* v. *Jagunnath Bysack* (5), and several other cases are relied upon.

These being the contentions of the parties, the decision of the second point must depend upon the determination of the following questions :—

(1) Whether the tenancy in this case was created by the lease of the $\frac{\text{19th Chait 1257}}{\text{31st March 1851}}$ or arose out of the sub-division of an ancient tenancy and carried with it the incidents of that tenancy.

(2) Whether in either case the length of possession of the tenant, the transfers of the holding, and the erection of *pucca* buildings on it, are circumstances sufficient to warrant the inference that the tenancy was a permanent one, due regard being had to the fact that the estate of the landlord had been let out in *ijara* or farm for many years.

(3) Whether the erection of the *pucca* buildings in question was under circumstances such that the landlord should be presumed to have acquiesced in the same, and should be held to be estopped from disputing the tenant's right to remain on the land.

[580] (4) Whether the inference of a permanent grant or of acquiescence by the landlord, if it could otherwise arise, was negatived by the fact of the lessor being a trustee of an endowment and his right being consequently limited.

Upon the first question this is how the facts, so far as they can be gathered from the evidence, stand. There was a holding of 4 bighas and 5 cottahs of land belonging to Nizam Mistry. When it was created, what its nature was, and how much its rent was, we do not know. One Golam Kadir by a decree based on a compromise obtained 3 bighas and 13 cottahs out of that land at a rent of Rs. 14-3, and out of that land he sold to Sadhu Serang, predecessor in interest of the present defendant, 14 cottahs, the land now in dispute by a conveyance dated the 17th Pous 1256, describing the property sold as a cocoanut garden with homesteads of tenants. Sadhu Serang applied to the landlord for settlement of the land and he obtained settlement of the 14 cottahs at a rent of Rs. 2-11-8 on the 19th Chait 1257, and executed a *kabuliyat* (Ex. III) on that date, in which he said that his vendor had made a written relinquishment on the 17th Pous 1256, and he had made a written petition for settlement on the 31st Sravan of the same year.

These being the facts, it was argued for the respondent, that the intention and effect of the transaction evidenced by the *kabuliyat* of the

(1) 5 W. R. 158. (2) 9 W. R. P. C. 3. (3) 24 W. R. 176.
(4) 7 B.L.R. 152. (5) 10 C. L. R. 25.

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19th Chait 1257 was not the creation of a new tenancy, but only the recognition of the subdivision, and transfer of a part of the old tenancy of Nizam Mistry: that the relinquishment of the 17th of Pous 1256 referred to in the *kabuliyat* was the conveyance of that date; and that the *patta* referred to in that document was in the nature of a confirmatory *patta*. We are unable to accept this argument as valid. No doubt confirmatory *pattas*, as remarked by the Privy Council in *Ram Chunder Dutt* v. *Jogesh Chunder Dutt* (1) are common in this country, and are not inconsistent with the presumption that a prior title existed; but the *patta* taken by Sadhu Serang has not been produced, and judging from the language of the *kabuliyat* (Ex. III), which must be taken to be the counterpart of the [581] *patta*, we cannot say that the *patta* in this case was in the nature of a confirmatory document only. Nor can we hold that the written relinquishment referred to in the *kabuliyat* was the conveyance to Sadhu Sarang. A conveyance and a relinquishment deed are very different documents, and one could never have been mistaken for the other. The only reference to the old tenure of Nizam Mistry that occurs in the *kabuliyat*, is in the recital, and though the land settled under the *kabuliyat* is part of that tenure, there is nothing to show that the rent for that land was fixed with any reference to the rent of Nizam Mistry's tenure. It is true that the rent fixed for the 14 cottahs bears the same relation to Rs. 14-3, the rent for 3 bighas 13 cottahs obtained by Golam Kadir that the area 14 cottahs bears to 3 bighas 13 cottahs, but there is nothing to show how or when the rent of Rs. 14-3 was fixed. Sadhu Serang clearly states in the *kabuliyat* that he takes a settlement of 14 cottahs of land at a rent of Rs.2-11-8 according to the relinquishment of the former holder and to his own petition for settlement, and, if he refers to his purchase, he refers to it, not as the purchase of the land but as the purchase of "the fixtures and structures" upon it. We should note here that there is a slight mistranslation in the *kabuliyat* which appears to be somewhat misleading. In the original of the sentence translated as "I shall continue to hold and enjoy without any anxiety," there is nothing corresponding to the words "continue to," and the words corresponding to "without any anxiety" are the usual formal words *param sukhe* (পরম সুখে) that is "with perfect happiness." Reading the *kabuliyat* as a whole and having regard to all the surrounding circumstances we think it created a new tenancy in favour of Sadhu Serang in 1257 or 1851.

The *kabuliyat* on the face of it contains nothing to imply permanency in the tenure created. The usual words *mourasi macorari* do not occur in it, nor is there any thing to show that the lease was taken for building or residential purposes. But that does not necessarily make the tenancy a terminable one; as upon the authorities a permanent tenancy may still be inferred from the length of possession by the tenant and his predecessors, from the fact of the tenure having been made the subject of transfer to the knowledge of the landlord, and from the fact of *pucca* [582] buildings having been erected on the land with the knowledge of the landlord. See *Dhunput Singh* v. *Gooman Singh* (2) and *Prossunno Coomar Chatterjee* v. *Jagunnath Bysack* (3). This brings us to the consideration of the second of the four questions stated above.

Upon that question this is how the facts stand. The tenure in question had been in the possession of Sadhu Serang and his heirs and

(1) 19 W. R. 353. (2) 9 W. R. P. C. 3. (3) 10 C. L. R. 25.

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their transferees for about forty-six years when this suit was brought, but there has been no mutation of names in the landlord's office, nor any recognition of the transferees except by receipt of rent from them, the name of Sadhu Serang still continuing as that of the recorded tenant. And there are two *pucca* buildings on the land, one of which was erected about 40 years ago and the other about 25 years ago. This appears from the evidence of the defendant's witness No. 1, which we see no reason to disbelieve. But there is nothing to show that these buildings were erected with the knowledge of the landlord. And it should be borne in mind that the estate of the landlord has been held all this time by a succession of *ijaradars*.

Now, are these facts sufficient to warrant the inference that the tenancy was, when first created, intended to be permanent, or was subsequently by implied agreement converted into a permanent one? We think this question, which we are considering apart from the question of acquiescence and estoppel, ought to be answered in the negative. When the origin of a tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and of the acts and conduct of the parties generally, constitutes the best and indeed the only evidence to prove the nature of the tenancy. If that had been the case, the evidence of the mode of dealing with the property such as we have here, might, perhaps, have been sufficient to raise the presumption of a permanent tenancy. But where, as in this case we know when and under what circumstances the tenancy was created, evidence such as has been adduced is not sufficient for that purpose. Indeed, the circumstances attending the creation of the tenancy positively militate against any [583] inference that it was intended to be permanent. For, though the first tenant, Sadhu Serang had, before taking the settlement, purchased the land from its former holder under a conveyance (Ex. B 2) purporting to transfer a permanent interest, in his *kabuliyat* by which he took the settlement he not only omitted to make any stipulation for permanent occupation, but made no mention of his having purchased the land and was content with stating that he had purchased merely the fixtures and structures thereon. This clearly indicates that the landlord was unwilling to create any permanent tenancy, and the tenant agreed to accept a non-permanent lease. The lease therefore was clearly not intended to be a permanent one at its inception. Can it then be inferred from the acts and conduct of the parties that it was by implied agreement subsequently converted into a permanent lease? We think not. If it is unlikely that the tenant would have spent money in erecting *pucca* buildings on the land, and the landlord would have allowed the buildings to remain on the land so long without objection, unless there was such an implied agreement, it is at least as unlikely that the landlord, who had been so cautious as not to allow the insertion of a single word in the *kabuliyat* which might imply permanency, would without any apparent reason come to such an agreement subsequently. Moreover there is nothing to show that the buildings were erected with the knowledge of the landlord; and the fact of their having been allowed to remain on the land without objection is explained by the circumstances that the estate of the landlord has been all along let out in *ijara*. We may add that the fact of the tenure in question having been the subject of several transfers has not much material bearing upon the present question, as there is no dispute about its transferability so long as the tenancy is not determined, the point in dispute being whether it is permanent.

We have not thought it necessary to discuss in detail the various cases cited on both sides, most of which have been considered by Mr. Justice Rampini in the case of *Nabu Mondul* v. *Cholim Mullick* (1), because the general principle laid down in, or deducible from, all of them is substantially the same, and is [584] stated in terms most favourable to the tenant in two cases to which we have referred above, namely, *Dhunput Singh* v. *Gooman Singh* (2) and *Prossunno Coomar Chatterjee* v. *Jagan Nath Bysak* (3); and the result of the application of that principle in each case must depend upon the facts of that case. Applying the principle laid down in those cases to the facts of this case, theconclusion we come to is that the mode in which the property has been dealt with and the acts and conduct of the parties generally, are not sufficient to warrant the inference, that the tenancy in question was intended to be permanent at its inception or was converted into a permanent one subsequently. The only case which requires special notice is *Dunne* v. *Nobo Krishnā Mukerji* (4). The facts of that case were very different from those of the present case. There there was nothing to show under what circumstances and conditions the tenure was created; and there was evidence to show that the tenure had been held at a uniform rent for nearly one hundred years; and in that state of facts the Court held that a presumption arose that the tenure was a permanent one.

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We come next to the question of acquiescence and estoppel. Although the tenancy might not have been a permanent one by agreement, express or implied, yet, if the landlord stood by and permitted the tenant to spend money in erecting *pucca* buildings on it in the belief that it was permanent, he would be estopped from denying the permanent right of the tenant. But to avail himself of the plea of acquiescence and estoppel, it is necessary for the tenant defendant to show, that in spending money in erecting the buildings, he was acting under an honest belief that he had a permanent right in the land, and the landlord knowing that he was acting under such belief stood by and allowed him to go on with the construction of the building. See *Lala Beniram* v. *Kundan Lall* (5), see also *Ramsden* v. *Dyson* (6) and *Jugmohan Das* v. *Pallonjee* (7).

[585] Now in dealing with the question whether the facts of the case warrant an inference in favour of a permanent grant, we have already indicated our reasons for thinking that the tenant Sadhu Serang, by whom the first building was created, could not have had any good ground for believing that the tenancy was a permanent one. But supposing that he and his successors in interest might have acted under any such belief, there is nothing to show that the landlord knew that they were so acting, or even that he knew of the creation of the buildings while they were being constructed. And it is clearly not enough to show that the landlord became aware of the existence of the buildings after they had been erected and then allowed them to remain. See *De Bussche* v. *Alt* (8), and *Kunhammed* v. *Narayan Mussadan* (9). The plea of acquiescence and estoppel must therefore fail.

In the view we have taken upon the second and third questions stated above, it becomes unnecessary to consider the fourth question. If it had been necessary to consider that question, we should have felt some difficulty in answering it in the affirmative upon the materials placed

(1) 9 W.R.P.C. 3. (2) 10 C.L.R. 25. (3) 25 C. 896. (4) 17 C. 144.
(5) 26 I. A. 58. (6) (1866) L. R. 1 Eng. & Irish App. 129.
(7) 22 B. 1. (8) (1877) L.R. 8 Ch.D. 286. (9) 12 M. 320.

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before us, seeing that one of the plaintiff's own documents (Ex. VI), shows that his lessor holds certain properties as *towliat kharij*, that is, outside the endowment, and seeing also that the lease in his favour is itself in excess of the power of a *mutwali* of *wakf* property to grant. (*See* Amir Ali's Mahomedan Law, Vol. I, p. 279). We may add that the rent receipts filed by the defendant describe the estate as the *taluq* of the late Mannujan Begum, and not as *wakf* property, and that the question of *wakf* not having been properly raised in the Court below, the defendant had not sufficient opportunity of meeting the point.

For the foregoing reasons we think the tenancy in this case is not permanent and the landlord is not estopped from denying its permanent character.

It remains now to consider the third and the last point raised in this appeal, namely, that relating to compensation.

The defendant claims compensation for the buildings erected on the land. Such claim could not, in the case of a tenant, come **[586]** within the scope of s. 51 of the Transfer of Property Act, even if that Act applied to this case notwithstanding s. 2, cl. (*c*), because a tenant could not possibly believe in good faith that he was absolutely entitled to the land. The provision of the Transfer of Property Act relating to a tenant's right with reference to structures raised on the land held by him, is that contained in cl. (*h*) of s. 108, which only authorizes the tenant to remove structures raised. The same is the extent of his right under the law of this country in cases not governed by the Transfer of Property Act, as was held by a Full Bench of this Court in the case of *Thakoor Chunder Pramanik* v. *Ramdhone Bhuttacharji* (1). And the right of the tenant-defendant to remove the buildings raised by her or her predecessor in interest was not disputed by the learned Advocate-General, who appeared for the appellant. But there is no authority in support of the contention that a tenant in a case like this is entitled to compensation for buildings erected by him. The two cases relied upon by the learned counsel for the defendant, *Duttetrayi Rayaji Pai* v. *Sridhor Narain Pai* (2), and *Yeshwadabai* v. *Ram Chandra Takaram* (3), are clearly distinguishable from the present. In the former there were, as Mr. Justice Candy, who delivered the judgment of the Court, observes,—special circumstances "the near relationship of the parties, thus residing in close vicinity to each other, their ownership of the surrounding lands pointing to the presumption that the plaintiff by his conduct sanctioned the construction of the building and well and afforded hope and encouragement to the defendant that he would be allowed to remain in peaceable possession of the same, or at least would not be ejected without a reasonable return for the expenditure incurred by him." And in the latter case the land was found to be *fazendari* land from which the tenant could not be ejected, and it was further found that the landlord was precluded by his father's and his own conduct from recovering the land and premises from the tenant in the manner he sought.

[587] The defendant's claim for compensation in this case is therefore untenable.

The result is that this appeal must be allowed, the decree of the Court below, so far as it dismisses the claim for ejectment of the defendant, set aside, and in lieu thereof a decree made awarding the plaintiff possession of the land in dispute upon ejectment of the defendant, but

(1) 6 W. R. 228. (2) 17 B. 736. (3) 18 B. 66.

allowing the defendant to remove the buildings and other structures standing on the land within six months from this date. The appellant will recover from the respondent his costs in this Court and in the Court below.

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Appeal allowed.

APRIL 23rd. An application made for review of this judgment was rejected.

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CRIMINAL APPEAL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Macpherson.

QUEEN-EMPRESS *v.* DEBENDRA KRISHNA MITTER.*
[23rd February, 1900.]

Mortgage—Mortgage, definition of, for purposes of stamp duty—Assignment by way of mortgage of valuable security to secure pre-existing debt—Stamp duty payable thereon—Stamp Act (I of 1879), *s.* 3, *sub-s.* (13), *s.* 61, *sch.* I, *art.* 29, cl. (*b*) *and art.* 44.

Article 29 of sch. I of the Stamp Act (I of 1879) applies to an instrument evidencing an agreement to secure the repayment of a loan, executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. It contemplates an instrument contemporaneous with the advance and with the loan.

For the purpose of ascertaining what stamp duty is payable on an instrument alleged to be a mortgage, it is necessary to see if the instrument is a mortgage as defined in the Stamp Act.

[R., 4 L.B.R. 2.]

IN this case the accused executed an instrument, dated the 24th of August 1898, whereby he promised to pay on demand at Calcutta to one Annada Prasad Moitra, the sum of Rs. 5,232-2 with interest at the rate of 12 per cent. per annum for value received as per certain Promissory Notes executed by the accused in favour of one Shama Charan Moitra, which notes had been endorsed by the said Shama Charan Moitra without recourse **[588]** to him for valuable consideration to the said Annada Prasad Moitra and were by the said instrument cancelled, and as security for the repayment of the sum of Rs. 5,232-2 with interest the accused mortgaged, transferred, and assigned by way of collateral security all his right, title and interest to and in a Promissory Note payable on demand, dated the 10th of January 1895, executed by one Woodoy Chandra Sanyal, deceased, in favour of the accused, which note was at that time filed in a suit in the Court of the Subordinate Judge of 24-Pergunnahs.

The instrument executed by the accused was as follows :—

CALCUTTA, 24th August 1898.

On demand I, Debendra Krishna Mitter of No. 29, South Chakrabaria Road in Bhowanipur in the suburbs of the town of Calcutta in the District of the 24-Pergunnahs, son of Babu Harish Chunder Mitter, deceased, Kayastha, landholder, promise to pay at Calcutta to Babu Annada Prasad Moitra of No. 50, Sukea's Street, Simla, in Calcutta aforesaid, son of Ramgati

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* Criminal Appeal No. 2 of 1900, against the order passed by T. A. Pearson, Esq., Chief Presidency Magistrate of Calcutta, dated the 18th of July 1899.

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Moitra, deceased, Brahmin, landholder, or order, the sum of rupees five thousand two-hundred and thirty-two and annas two only, with interest thereon at the rate of 12 per cent. per annum for value received as per my Promissory Notes on demand noted in the memorandum below, which were payable to Babu Shama Charan Moitra, or order, but endorsed by him without recourse to him for a valuable consideration to the said Babu Annada Prasad Moitra, which said notes are hereby cancelled; and as security for the repayment of the said sum of rupees five thousand two-hundred and thirty-two and annas two as principal, and for payment of the interest thereon at the aforesaid rate until realization, I hereby mortgage, transfer, and assign by way of collateral security all my right, title, interest, claim, and demand against one Woodoy Chandra Sanyal now deceased, his heirs, representatives, and assigns by virtue of a Promissory Note payable on demand executed by the said Woodoy Chundra Sanyal in my favour on the 10th day of January 1895, and I do hereby authorise and empower the said Babu Annada Prasad Moitra, his heirs, representatives, and assigns solely to apply for and obtain possession from the First Subordinate Judge's Court of the 24-Pergunnahs of the said Promissory Note of the 10th day of January with a Bengali Promissory Note executed by the said Woodoy Chandra Sanyal in my favour on the 28th day of April 1892, which was cancelled and renewed by the said Promissory Note of the 10th day of January 1895, and a Bengali *hathchitta*, dated the 29th day of Falgoon 1298 B.S., corresponding with the 11th day of March 1892, at present all filed in a suit in the said Subordinate Judge's Court in the 24-Pergunnahs being suit No. 119 of 1897, wherein I am the plaintiff, and Sreemutty Surbamongola Debee, the only daughter, heiress, and certificated administratrix to the estate of the said Woodoy Chandra Sanyal is the [589] defendant, to hold the same until the realization of the said principal and interest hereinbefore provided. And I do further absolutely authorise and empower the said Babu Annada Prasad Moitra to draw, recover, and realize the said principal sum of rupees five thousand two-hundred and thirty-two and annas two only, together with the aforesaid interest thereon at the rate of twelve per cent. per annum from and out of my said claim on the said Promissory Note of the 10th day of January 1895, either from the said Surbamongola Debee, her heirs, representatives, or assigns by virtue of these presents without any further concurrence or consent on my part or that of my heirs, representatives, or assigns. I bind myself, my heirs, representatives, and assigns absolutely to establish and legally prove my said claim against the said Surbamongola Debee, in the said suit, being suit No. 119 of 1897 in the said Sub-Judge's Court of the 24-Pergunnahs, and shall and will adduce all necessary evidence, and personally attend and give evidence under the guidance of the said Babu Annada Prasad Moitra, and shall not on any account absent myself from Court or be guilty of any laches or compromise, or effect any settlement out of Court or enter into any understanding with the defendant or any one on her behalf, or receive any money or consideration without the consent in writing of the said Babu Annada Prasad Moitra, failing which or acting in any wise contrary to the direction and guidance of the said Babu Annada Prasad Moitra, I shall be liable to be criminally prosecuted for cheating and committing criminal breach of trust; and that in order to completely and more perfectly securing the repayment to the said Babu Annada Prasad Moitra of the aforesaid principal and interest, I do hereby appoint him, the said Babu Annada Prasad Moitra, as my true and lawful attorney

irrevocably for me, and on my behalf, to manage and conduct the said suit, settle or compromise the same and to draw, recover, and realise, taking all lawful steps and proceedings therefor all and every the sum or sums of money, which I am entitled to recover and receive from the said Surbamongola Debee, her heirs, representatives, and assigns on the said Promissory Note of the 10th day of January 1895, or any other sum or sums of money which I may be entitled to recover and receive from the said Sreemutty Surbamongola Debee, her heirs, representatives and assigns under and by virtue of any decree made in the suit No. 119 of 1897 by the said Sub-Judge's Court of the 24-Pergunnahs or by means or reason of any amicable settlement out of Court as aforesaid giving sufficient receipts therefor as my said attorney as aforesaid to, for, and with the intent and purpose of my said attorney in the first place paying to and recovering, and realizing for himself all monies for principal and interest which may be due, and owing to him by virtue of these presents, together with all costs incurred or to be incurred by him as to the first charge thereon, and then hold the balance, if any, in trust for me, my heirs, and assigns for their and my benefit as such attorney as aforesaid, and shall and will pay and distribute the same as by my letter or writing I shall direct him to do. And my said attorney **[590]** shall and will be at liberty without any further concurrence or consent on my part at any time hereafter to take all such steps and proceedings as may or shall be necessary to obtain delivery to him of the said Bengali Promissory Note of the 17th day of Baisack 1299 B.S. corresponding with the 28th day of April 1892, and the said Promissory Note, dated the 10th day of January 1895, both executed in my favour by the said Woodoy Chandra Sanyal and the said Bengali *hathchitta*, dated the 29th day of Falgoon 1298 B.S., corresponding with the 11th day of March 1892, and my said attorney shall and will be at liberty to delegate his authorities hereinbefore mentioned in writing to any person or persons he shall or may think fit without further concurrence or consent on my part and shall appoint pleaders, attornies, mooktears or barristers as he may think necessary. And all and whatsoever my said attorney shall do or cause to be done in the premises I agree to satisfy and confirm as my own act and deed.

DEBENDRA KRISHNA MITTER.

WITNESSES:

Prya Nath Sen, Solicitor, Calcutta.

Soshi Bhusan Mukerjee, clerk to Babu P. N. Sen, Solicitor.

This instrument was stamped with stamps of the value of Rs. 9-8. It was impounded and forwarded to the Collector of Stamp Revenue as being insufficiently stamped by the Registrar of Assurances.

The accused was prosecuted under s. 61 of the Stamp Act of 1879 for having executed a mortgage without the same being duly stamped.

The Chief Presidency Magistrate of Calcutta tried, and on the 18th of July 1899 discharged, the accused and gave the following reasons :—

In this case the accused has executed an instrument, dated 24th August 1899, evidencing on agreement to secure the repayment of a loan of Rs. 5,232-2, with interest giving as a collateral security a certain Promissory note payable on demand by one Woodoy Chandra Sanyal, dated 10th January 1895. This note is now the subject of a suit No. 119 of 1897 in the Court of the Subordinate Judge of Alipur, and it is hypothecated to the accused under the instructions above referred to.

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This instrument has been stamped with a stamp of the value of Rs. 9-8; it has however been impounded and forwarded to the Collector of Stamp Revenue, as being insufficiently stamped by the Registrar of Assurances.

The head assistant in the Stamp Department has produced the document before me in a case in which the accused is prosecuted under s. 61 of the Stamp Act of 1879, for having executed a mortgage without the [591] same being duly stamped. The accused contends that the document is not a mortgage.

I agree with the accused's contention. The instrument is not a mortgage, for a mortgage is the "transfer of an interest in specific immoveable property, for the purpose of securing the payment of money advanced or to be advanced by way of loan."

The instrument does not transfer any interest in immoveable property at all, but deals with moveable property only. It in reality hypothecates a valuable security in the shape of a Promissory Note which is moveable property. The complainant contends that it should be stamped under art. 44 (*b*) of sch. I of the Stamp Act, but I think that this is an error and that the instrument should be stamped under art. 29, cl. (*b*) of that schedule with half the duty payable on a bill of exchange No. 11 (*b*) for the amount secured. The fact that the words "mortgage, transfer, or assign" occur in this instrument, does not make the document a mortgage. The accused has already stamped the document with stamps value Rs. 9-8, which is over the value of the stamps required under art. 29, cl. (*b*). The accused is discharged—document returned to Mr. Eagleton, as the Registrar holds his receipts for it.

(Sd.) T. A. PEARSON,
Chief Presidency Magistrate.

Calcutta, 18th July 1899.

The Standing Counsel (Mr. *O'Kinealy*), for the Crown.—The Magistrate was in error in holding that the instrument in question was not a mortgage. For the purpose of ascertaining the stamp duty we must look to the definition of a mortgage as given in the Stamp Act and not as given in the Transfer of Property Act, as the Magistrate appears to have done. The instrument is clearly a mortgage as defined in the Stamp Act. The Magistrate has held that the instrument has been sufficiently stamped, and that art. 29, cl. (*b*) of the Stamp Act applied; that article I submit, has no application to an instrument such as this is; the article which does apply is art. 44, and that being so the instrument has not been sufficiently stamped.

Babu *Dwarka Nath Mitter*, *contra*, for the accused.—I must concede that the document in question is a mortgage as defined in the Stamp Act; nevertheless I contend that it has been properly stamped as it falls within art. 29, cl.(*b*) of the Stamp Act of 1879. Article 44, by excluding a mortgage-deed not provided for by art. 29, implies that the document contemplated by art. 29 is also a [592] mortgage-deed. Article 44 would seem to apply to mortgages of immoveable properties only as it speaks of the delivery of possession of property or any part of the property. The document in this case is an instrument which purports to be an agreement to secure the repayment of a loan made upon the deposit of a negotiable instrument, which is a valuable security and is clearly one contemplated by art. 29, cl. (*b*). There is no actual deposit in this case, but there is, I submit, a constructive deposit. A deposit may be either actual or constructive. Here the valuable security is in the possession of the Court in a suit filed by my

client, it is therefore a constructive deposit. The term "valuable security" is not defined in the Stamp Act, but is defined in the Penal Code. The Promissory Note deposited in this case comes within that definition. The loan secured by the document is also repayable on demand; there is, I submit, no doubt that the document falls within art. 29, cl. (*b*), and has been properly stamped. Should the Court be against me on this point I would submit that, as the accused never intended to defraud the Government, he should be let off with a penalty.

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The judgments of the Court (MACLEAN, C.J. and MACPHERSON, J.) were as follows:—

JUDGMENTS.

MACLEAN, C. J.—The short point we have to decide is whether the document in this case ought to have been stamped under art. 44 of sch. I of the Stamp Act of 1879 or under art. 29 of that schedule.

I am unable to agree with the learned Chief Presidency Magistrate in his view that, for the purpose of ascertaining what stamp duty is payable, we are to look to the definition of a mortgage given in the Transfer of Property Act. We need not travel so far afield, for a mortgage-deed is defined by sub-s. 13 of s. 3 of the Stamp Act, and the instrument in question in this case is, in my opinion, a mortgage-deed within the meaning of that sub-section. It is an instrument whereby for the purpose of securing an existing debt, the transferor transferred to or created in favour of the transferee, a right over specified property. If this be so, as I think it must, what is the stamp duty properly payable upon a mortgage-deed? Art. 44 of sch. I tells us [593] what is the duty to be paid upon a mortgage-deed not provided for by arts. 14, 15, 29, or 55. We may admittedly lay aside arts. 14, 15, and 55. They have no bearing upon the present question. The duty then will be payable under art. 44, unless the case is covered by art. 29. That brings us to the question whether this is an instrument evidencing an agreement to secure the repayment of a loan made upon the deposit of a valuable security. I think it is not. That article applies to an instrument evidencing the agreement to secure the repayment of the loan, which means I think an instrument executed at the time the loan is made, not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. The most common class of case to which it would apply would be that of an ordinary equitable mortgage by deposit of title deeds, accompanied with a memorandum of charge. The article seems to me to contemplate an instrument contemporaneous with the advance and with the deposit, and that is not the case here. I think, therefore, that duty is payable under art. 44 and that the case must go back to the learned Magistrate with this intimation of our opinion.

MACPHERSON, J.—I also think that the document in question is a mortgage-deed and that it requires to be stamped under art. 44 of the first schedule of the Stamp Act of 1879 and that it is not a document provided for in art. 29 of that schedule.

D. S. *Case remanded.*

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APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson and Mr. Justice Hill.

NEW YORK LIFE INSURANCE COMPANY (*Appellants*) *v.* PHOEBE STELLA GAMBLE (*Respondent*)* [20th, 21st, 22nd, 23rd, 24th and 28th February, and 1st, 2nd and 3rd March, 1899 and 10th January, 1900.]

Insurance—Life assurance—Truth of answers to queries of Life Insurance Company—Warranty—Declaration by assured to medical examiner of Company—Admissibility of evidence to show declarations not made by assured—Verbal representation to medical examiner, effect of.

[594] *G* applied to the defendant-company in Calcutta to insure his life for the sum of Rs. 10,500, to be secured by five different policies. The policies were duly executed by the Company and delivered to the plaintiff, the wife of *G*, on his behalf. The Company's printed form of application for insurance and the printed form of declarations to the Medical Examiner of the Company were signed by *G*.

The agreement of *G* with the Company was that the statements and representations contained in his application, together with those made to the Medical Examiner by him, should be the basis of the contract between him and the Company. He warranted them to be full, complete, and true, whether written by his own hand or not, and that the warranty was to be a condition precedent to, and a consideration for, the policy which might be issued thereon; and he further agreed that no statements, representations or informatian made or given by or to any person soliciting or taking the application for the policy, or by or to any other person, should be binding on the Company, or in any way affect its rights unless such statements, representations or information be reduced to writing, and presented to the officers of the said Company at their Home office in the city of New York on the application.

On *G*'s death the plaintiff sued the Company for the amounts due under the policies.

The plaintiff admitted that certain statements and representations made by *G* both in his applications and declaration to the Medical Examiner, were untrue but urged that it was open to her to show (1) that *G* signed the declaration to the Medical Examiner before it was filled up, and in consequence was not responsible for the contents of that declaration ; (2) that *G* showed to the Medical Examiner a certain statement drawn up by *G* of an illness he had suffered from for three years, and that the knowledge thus acquired by the Medical Examiner must be imputed to the Company.

Held, reversing the decision of the Court below, that the plaintiff was bound by the terms of the contract between *G* and the Company. That it was not open to the plaintiff to show that *G* did not state what, under his own signature, he declared to be true, and yet to hold the Company liable on the policy, brushing aside and treating as of no import whatever the statements and representations which formed the basis of the contract.

That the misstatements and misrepresentations made by *G* were amply sufficient to warrant the Company in avoiding the policy.

THIS was a suit brought by the plaintiff against the defendant Company to recover the sum of Rs. 10,500 with interest.

The plaintiff alleged that her husband, one John Frederick Gamble, a Master Mariner and a resident of Calcutta for several years, in September, on the eve of his departure for England, applied to the defendant-company in Calcutta to insure his life for the [595] aggregate sum of Rs. 10,500, to be secured by five policies, and, after reference to the Head Office of the defendant-company in New York, the five policies were duly executed by the defendant-company, and delivered to the plaintiff in Calcutta on behalf of her husband on or about the month of December 1893.

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* Appeal from Original Civil No. 9 of 1899, in suit No. 305 of 1897.

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The five policies were, with the exception of the sums thereby secured, all in similar terms both in body and in their endorsements or annexures, three of them being dated the 21st of October 1893 and the two others the 30th of October 1893. Before he applied to the defendant-company to insure his life Gamble had applied to the Sun Life Assurance Company of India for the same purpose, and his application had been refused without his undergoing medical examination. He had also made a similar application to the London and Lancashire Life Assurance Company, and the application was pending, and had not been answered when he made his application to the defendant-company. These facts were disclosed in the application for insurance upon which the policies were granted by the defendant-company.

That the forms of the defendant-company connected with the application for the first three policies, including the printed form of the application for insurance and the printed form of declarations to the Medical Examiner of the defendant-company, were brought to Gamble's house on the 18th of September 1893 by one Chunee Lall Bose, who was employed by the defendant-company as a canvasser, and a native doctor, who was employed by the defendant-company to examine Gamble and to take the declarations. The form of application was then and there filled up and signed by Gamble and was retained by Chunee Lall Bose. The native doctor then examined Gamble in a separate room, and when the examination was finished the form of declaration to the Medical Examiner was signed by Gamble without being filled up, but was retained by the native doctor to be filled up by him. The native doctor made notes in a book of the result of his examination of Gamble to enable him to fill up the form of declaration. That Gamble had by him at the time a statement drawn up by himself sometime previously of an illness from which he had suffered from the year 1888 to 1891, and of which he had been cured by a Doctor D'Mello. **[596]** This statement Gamble showed to the native doctor and informed him what it was, whereupon the native doctor then read it. The statement had been drawn up by Gamble by way of a puff or commendation of the medicine with which Doctor D'Mello had cured him, and which D'Mello had intended to patent. Gamble went on boardship to depart for England on the night of the 18th September. That on the 18th of September, Gamble intimated to Chunee Lal Bose his wish to be insured by the defendant-company in the further sum of Rs. 4,000 under two policies of Rs. 2,000 each, and with a view to such insurance the defendant-company's printed form of application for insurance and relative form of declarations to the Medical Examiner were forwarded from the defendant-company's office to Gamble's house early on the morning of the 19th of September and were at once sent by the plaintiff to Gamble on board ship. Gamble signed the forms after filling them up in part and returned them to the plaintiff, who forwarded them to the defendant-company at their office in Calcutta. Gamble then left for England. That the premiums in respect of the policies had been paid up to the date of Gamble's death, which occurred in Southampton on the 25th of April 1894, and the plaintiff was entitled to recover the amounts due on the policies.

The defendant-company admitted that Gamble had made two applications to insure his life with them, and that upon the faith of the statements and representations made to them, both in the applications and through their medical adviser by Gamble, they executed and delivered the policies to Gamble. They, however, alleged that in and by the applications Gamble had agreed with them that the statements and

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representations therein contained, together with those made by Gamble to their Medical Examiner, should be the basis of the contract between Gamble and the company, that Gamble had warranted the same to be full, complete, and true, whether written by his own hand or not, and agreed that the warranty should be a condition precedent to, and a consideration for, the policies to be issued thereon, and also agreed that no statements, representations or information made or given by or to any other person, should be binding upon them, or in any manner affect their rights, unless the same should be reduced [597] into writing, and presented to them at their Home Office in the applications. That Gamble in and by his applications to them and in his statements to their Medical Examiner had made certain statements and representations which were untrue.

That at the time of making his application, Gamble was suffering from Bright's disease of the kidneys, that he had previously had rheumatism and had been subject to dyspepsia, and was at the time of making his application in an anæmic and debilitated condition. He had also suffered during the years 1888 to 1891 from the illness mentioned by him in his statement to Dr. D'Mello and had consulted several medical men. That shortly before applying to the defendant-company, Gamble had made an application to insure his life in the Positive Government Security Life Assurance Company, and had been examined by that Company's Medical Examiner who had pronounced an unfavourable opinion on his life, in consequence of which opinion that Company had refused to issue a policy upon the said application. That these facts had been suppressed by Gamble, who had made false statements in reference to them to the defendant-company. The defendant-company further alleged it was untrue that Gamble's statement to Dr. D'Mello had ever been shown to, or read by, their Medical Examiner, or that the form of declaration to their Medical Examiner was signed by Gamble before the same was filled up, nor did they admit that their Medical Examiner ever examined Gamble. That after the death of Gamble, and on or about the 3rd of August 1894, the plaintiff claimed the amounts insured by the said policies from the defendant-company, and falsely stated in support of her claim that no doctor had ever attended Gamble during his stay in India, and that under the circumstances they were justified in refusing to pay the amounts of the said policies.

The following is the material portion of one of the policies issued by the defendant-company to Gamble:—

Number 566821.
Age 41
Quarter.
Annual Premium

	Rs.	A.	P.
	24	2	7
Extra for occupation.	1	4	0
	25	6	7

Exhibit 12. Amount Rs. 2,000

THE NEW YORK LIFE INSURANCE COMPANY,

By this Policy of Insurance,

In consideration of the agreements, statements, representations, and warranties submitted to its officers at the Home Office, in the City of New [598] York, in the written application for this Policy, which are hereby referred to and made a part of this contract, and in further consideration of the sum of twenty-five rupees six annas and seven pies to them in hand paid, and of the quarter annual payment of twenty-five rupees six annas and seven pies to be made on or before the first day of January, April, July, and October in every year during the continuance of this Policy.

Doth insure the life of John F. Gamble, Mariner of Calcutta, Bengal, India (hereinafter called the Insured) in the amount of two thousand rupees commencing on the first day of October 1893 at noon. And the said Company doth hereby promise and agree to pay the amount of the said Insurance, at its office in the City of New York, to Phoebe S, wife of the insured, or in the event of her prior death, to the insured's executors, administrators or assigns upon receipt and approval of proofs, as hereinafter required, of the death, during the continuance of this policy, of the said insured, deducting therefrom all indebtedness to the Company, together with any balance of the year's premium remaining unpaid. This policy is issued and accepted upon the following express conditions and agreements :— 1900 JAN. 10. — APPEAL FROM ORIGINAL CIVIL. — 27 C. 593.

First.—If this policy shall become a claim by death after having been in force two full years, the Company will not contest its payment on account of the incorrectness of any statement in the application, or in the accompanying declarations to the Medical Examiner (except in case of fraud) provided, however, that if the age of the insured is understated the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age.

Second.—That if any one of the premiums is not paid, as hereinafter provided, on or before the day when due, then this policy shall become void, and all payments previously made shall be forfeited to the company except that (as provided by Act of May 21, 1879, Chap. 347, Laws of 1879 of the State of New York) if this policy shall lapse or become forfeited for the non-payment of any premium, after being in force three full years, a paid-up policy will be issued, on demand made within six months after such lapse with surrender of this policy, under the same conditions as this policy, except as to payment of premiums, but without participation in profits, for such an amount as the net reserve on this policy at the time of lapse, computed by the American Table of mortality and interest at four and one half per cent., after deducting all indebtedness to the company, will purchase as a single premium at the present published rates of the company, at the age of the insured at the time of lapse ; and all right to any other paid-up policy or surrender value, provided for by the Statute of any state or country, is hereby waived.

Third.—That the provisions, requirements, and benefits, printed or written by the company, upon the next page of this policy, are a part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

[599] In witness whereof, the said New York Life Insurance company has, by its duly authorized Officers, signed and delivered this contract, this twenty first day of October one thousand eight-hundred and ninety-three.

CHAS. C. WHITNEY, *Secretary.* JOHN A. McCALL, *President.*

Material portion of Gamble's application to the defendant-company. (Ex. D).

Ordinary Life

Non-forfeiting Free Tontine Policy.

British East-Indies Class.

92-5-14.

Abstract (E. & O. E.) of the application for Insurance in the New York Life Insurance Company.

Policy No.

Application to the New York Life Insurance Company for a NON-FORFEITING FREE-TONTINE POLICY.

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9 *A*. Has any proposal or application to insure your life ever been made to any company or agent, upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for?	*A*. Yes; I applied to the Sun Life Insurance Company but was not examined.
B. If so, state full particulars, to what company, when and, &c.	*B*. I am applying to the London Lancashire.

I do hereby agree as follows:—(1) That the statements and representations contained in the foregoing application, together with those made to the Medical Examiner by me, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand or not, this warranty being a condition precedent to, and a consideration for, the policy which may be issued hereon. (2) That inasmuch as only the officers at the Home Office of said company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person shall be binding on said company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing, and presented to the officers of said company at the Home Office, in this application. (3) That in any distribution of surplus or profits, the principles and methods which may be adopted by said company for such distribution, and [600] its determination of the amount equitably belonging to any policy which may be issued under this application, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under such policy. (4) That any Policy which may be issued under this application shall not be in force until the actual payment to, and acceptance of, the premium by said company or its authorized agent, during my life-time and good health. (5) That the contract contained in such policy, and in this application, shall be construed according to the Law of the State of New York, the place of said contract being agreed to be the Home Office of said company in the city of New York. (6) That no suit shall be brought against said company under said contract after the lapse of one year from the date of death of the insured.

Dated at Calcutta this 16th day of September 1893.

Witness
Agent

Signature of the person applying for Insurance on his life (write the name in full) } JOHN GAMBLE.

Free Tontine British East Indies class.

91-2-96.

Policy to date from 1st of October 1893.

Material portion of the declaration made by Gamble to the Medical Examiner. (Exhibit E.)

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[601] DECLARATIONS MADE TO THE MEDICAL EXAMINER OF THE NEW YORK LIFE INSURANCE COMPANY.

The Applicant for Insurance must answer the following questions, which will be asked him by the Medical Examiner: the answers form an essential part of the Contract.

1. Have you had, since childhood, any of the following Complaints? Answer (Yes or No) opposite each.

Apoplexy	... No.	Disease of Heart	No.	General Debility	No.	Piles	... No.	Small pox	... No.	
Asthma	... No.	Disease of Kidneys	... No.	Gout	... No.	Pleurisy	... No.	Skin disease	... No.	Give full particulars of any illness you may have had since childhood.
Bilious colic	... No.	Disease of Liver	No.	Insanity	... No.	Pneumonia	... No.	Spinal disease	... No.	Except a few attacks of biliousness, I had no other illness.
Bronchitis	... No.	Disease of Lungs	No.	Jaundice	... No.	Rheumatism	... No.	Spitting or Raising blood	... No	When were you last confined to the house by illness?
Cancer	... No.	Disease of urinary organs	No.	Palpitation	... No.	Rupture	... No.	Syphilis	... No.	I was never confined to the house.
Dropsy	... No.	Fistula	... No.	Paralysis	... No.	Scrofula	... No.	Yellow fever	... No.	
Disease of Brain	No.	Fits or Convulsions	No.							

2. Have you ever had severe headaches, vertigo, fits, or any nervous or muscular trouble?	No.
3. A. Are you subject to cough, expectoration, palpitation or difficulty of breathing?	A. No.
B. Have you ever been? If so to which, when, and full details.	B. No.
4. Are you subject or predisposed to dyspepsia, Dysentry or Diarrhœa?	No.
5. Have you ever met with any accidental or serious personal injury?	No.
6. Have you ever been seriously ill? If so, when, with what, and who was the medical attendant? (State his name and residence.)	No.
7. A. Name and residence of your usual medical attendant.	A. No fixed Medical attendant.
B. When and for what have his services been required.	B.
8. Have you consulted any other medical man? If so, when and for what?	No.
9. Has any proposal or application to Insure your life ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars.	No.
10. Has any physician given an unfavourable opinion upon your life with reference to Life Insurance? If so, state particulars.	No.

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[602] I hereby declare that I am the person who has made and signed the accompanying application for insurance in the New York Life Insurance Company, dated 18th September 1893; that I am temperate in my habits, and am, to the best of my knowledge and belief, in sound physical condition and a proper subject for Life Insurance.

JOHN GAMBLE.

The case was heard on February 20th, 21st, 22nd, 23rd, 24th, 28th and March 1st, 2nd, 3rd, 1899.

Mr. *Sinha* (Mr. *Gregory* with him), for the plaintiff.

Mr. *Garth* (Mr. *Knight* with him), for the defendant-company.

Cur. adv. vult.

JUDGMENT.

MARCH 10th, 1899. AMEER ALI, J.:—

The plaintiff in this case seeks to recover from the defendant-company Rs. 10,500, the amount of five policies on the life of her husband John Frederick Gamble. These polices were executed on the 1st October 1893. They begin by reciting "that in consideration of the agreements, statements, representations, and warranties submitted to its officers at the Home Office, in the city of New York, in the written application for this policy, which are hereby referred to and made a part of this contract," and in further consideration of certain sums to be paid periodically, the New York Life Insurance Company insures the life of J. F. Gamble who is therein described as a Captain of a vessel. Then follow the other operative parts of the policy and three provisoes, the third of which is in these terms:—

"That the provisions, requirements and benefits, printed or written by the Company, upon the next page of this policy, are a part of this contract, as fully as if they were recited at length over the signatures hereto affixed."

No question, however, is raised as to the effect of this proviso and it is unnecessary to dwell on it further. The defendants contend that they had executed the policy in question on the faith of the statements and representations made to the Company by John Gamble in certain applications or proposals for insurance as well as through their medical adviser, which statements and representations it was agreed between the parties were to be the [603] basis of the contract. They further allege that in and by the said application John Gamble "warranted the same to be full, complete, and true, whether written by his own hand or not, and agreed that the said warranty should be a condition precedent to, and a consideration for, the policies to be issued thereon, and also agreed that no statements, representations or information made or given by or to any other persons, should be binding upon the defendants or in any manner affect their rights unless the same should be reduced into writing, and presented to the defendants at their Home Office in the said applications," and they allege that the statements made by John Gamble were untrue, and in the result they contended that the policies are void. The fourth paragraph of their written statement sets out in what respects the statements and representations are said to be untrue, and the fifth paragraph is in these terms:—

"The defendants are informed and believe that it is wholly untrue that the said Ex. B (which is a copy of a statement said to have been given by Gamble to one D'Mello) to the plaint was ever shown to, or

read by, their Medical Examiner, or that the form of declaration to their said Examiner was signed by the said assured before the same was filled up as alleged in the eighth paragraph of the plaint, and they do not admit that their said Medical Examiner ever examined the said assured as therein alleged.

The applications on which the policies were issued were made on the 16th and 18th of September, respectively. On the night of the 18th, Mr. Gamble proceeded to England where he died in April following, and there is no question now about his death.

The issue for determination accepted by counsel on both sides is one of fact, namely, whether the statements which are charged by the defendants to be untrue are the statements of John Gamble.

Learned Counsel for the defendants contended that the conditions to which I have referred at the outset of this judgment is (*sic*) a warranty; that the assured warranted thereby the truth of each and every statement and that, if any one of those statements be untrue, the policy would be void. The system of Life Insurance is now becoming so general in this country that it may **[604]** not be without advantage to call attention to the nature of these conditions. An express warranty, as it is contended the condition contained in these policies amounts to, has been defined to be "a stipulation inserted in writing on the face of the policy on the literal truth or fulfilment of which the validity of the entire contract depends."

By a stipulation of this character the assured binds himself "hand and foot" to use the words of the learned American author whose work is a standard authority on Insurance Law "that his application contains a full, true, and just exposition of all the facts enquired for or its equivalent in a different form of words, and it is to be deemed a warranty." "Such policies are no security at all. The assured is at the mercy of the insurers, and if he is so imprudent as to make such a bargain the Courts cannot help him." The assured may, without the smallest intention of deceiving, undesignedly make a statement as to an immaterial fact. If that turns out to be untrue, that is to say, not in accordance with fact, the insurers are entitled to say that the policy is void. But whilst giving effect to these conditions on the ground that the insurers are entitled to stipulate what they choose in order to safeguard their interests or to prevent even the slightest chance of fraud, Courts of Justice have construed these conditions with the utmost strictness. If the language of the questions in the application or the declarations is indefinite or ambiguous, they mnst be construed to use Lord Watson's language in the case of *Thomson* v. *Weems* (1) "*contra pro ferentes* and in favor of the assured."

On this subject the words of the text writer to whom I have referred are worthy of note:—"Where the language of the questions contained in the application is ambiguous or indefinite or calls for answers, which may be to some extent a matter of opinion so as to admit of different answers, if the insured answer in good faith in some proper sense, and when the application is unintentionally defective in a manner known to the insurers or their agent, the insured will be excused though he do not give **[605]** the desired answer. If the company accepts an indefinite or insufficient answer it will be construed literally in favour of the insured."

(1) (1884) L.R. 9 App. Cas. 671.

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Where the words, therefore, are without violence susceptible of two interpretations, that which will sustain the claim of the assured must in preference be adopted. Again Courts of Justice in England and America, where insurance cases are common, have set their faces against constructive warranties, and have invariably insisted upon strict proof that the representations or statements alleged to be untrue are the statements of the persons making them, in order to avoid the contract.

Again where concealment is charged the concealment in fact must be established. In other words, where facts are withheld, which are known or which must be presumed to be known to an ordinary intelligent person, it is held to be concealment, but where the fact is not such as may be fairly presumed to be known to the applicant it cannot be regarded as concealment.

In the case of *Thomson* v. *Weems* (1) it appears that the deceased Weems applied to the Insurance Company represented by the appellant Thomson to effect a policy on his life. He recorded a printed form of proposal containing, among other questions, a question relating to his habits, namely, (1) whether he was of temperate habits; and (2) whether he had always been strictly so, and he answered (1) Temperate, (2) Yes. The case was tried, in the first instance, before the Lord Ordinary who found in favour of the assured and against the company.

On appeal before the House of Lords various questions were argued, and on behalf of the assured it was contended that the question whether a person was of temperate habits or not was a matter of opinion and not a question of fact. Their Lordships overruled the contention, and held that the statement regarding his being temperate or otherwise was a question not of opinion, but of a matter which was within his knowledge, a matter relating to his habits. Lord Watson in dealing with the several cases cited on behalf of the assured, stated that the cases on which reliance was placed related to an internal disease "of the [606] existence of which the person affected is unconscious, and which medical examination cannot detect until he is *in extremis*, or it may be until life is extinct; and the only point arising for decision was, whether a particular query or statement was so expressed as to include latent and unknown, as well as apparent and known, diseases. But intemperate habits are certainly not in any sense latent disease, only discoverable in a *post mortem* examination. Such habits may in some instances be occult, but as a general rule the knowledge of them is not confined to their owner; indeed it may happen that their outward manifestations are more readily appreciated by bystanders than by the man himself."

It also appears in a case where it was provided in the policy that if the answers were in any respect untrue the policy was to be void, and the question was whether the applicant had any sickness within the last 10 years, and the answer was that he had had pneumonia, but said nothing of a slight attack or chronic pharyngitis. It was held to be no concealment, as the party was not bound to state such facts as would ordinarily be deemed immaterial such as that he had had a cold or a diarrhœa or an irritation of the throat not fairly embraced in what is popularly understood as sickness. The bearing of this observation will be seen later.

The case of *Macdonald* v. *The Law Union Fire and Life Insurance Company* (2) does not militate with the view to which I have given

(1) (1884) L. R. 9 App. Cas. 671. (2) (1874) L. R. 9 Q. B. 328.

expression. In that case the plaintiff had effected an insurance on the life of another, and in the application or proposal had stated that the person being insured had not been proposed in another office and declined. The contention on behalf of the person insuring was that he was not aware of this fact, but the appellate Court was of opinion that the fact that he himself was not aware of it did not exclude the policy from the operation of the special condition. As I understand that case it proceeds upon the principle that the matter was one which could have been ascertained by a person of ordinary intelligence and ought to have been known to the person making the contract.

[607] I have already discussed the two principal cases cited at the bar. In *Anderson* v. *Fitzgerald* (1) the decision turned simply upon the question whether an answer was material or not.

The Courts of first instance were of opinion that the answer said to be untrue was not material. In the House of Lords the Judges held that it did not matter whether the answer was material or not. The question was whether the statement was included in the warranty, and, if so, whether it was untrue and the case was remanded for re-trial. In *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (2) the question was whether the declaration should be read as a part of the policy. The Chief Justice in his judgment pointed out that the two must be read together, and that what followed in the declaration must be held to control the condition in the policy itself, and that as the declaration set out that any false averment designedly made would avoid the contract, the question to determine was whether the statement was intentional or not.

There is another case which was not referred to at the bar, but which may probably be of some importance in dealing with the circumstances of this particular case.

In *Bawden* v. *London Edinburgh and Glasgow Assurance Company, Limited* (3) the knowledge of the agent was held to affect the company. In that case the assured in his proposal form stated that he had no physical infirmity, and it was agreed that the proposal should form the basis of the contract.

By the terms of the policy the company agreed to pay the assured £500 on permanent total disablement, and £250 on permanent partial disablement, the policy stating that by permanent total disablement was meant *inter alia*, "the complete and irrecoverable loss of sight to both eyes," and by permanent partial disablement was meant *inter alia* "the complete and irrecoverable loss of sight in one eye."

At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the [608] local agent or canvasser for the company was aware although he did not communicate it to the defendants.

It was held that the knowledge of the agent was the knowledge of the company, and the administratrix of the assured was entitled to recover on the policy.

It will be noticed that the case set up by the defendants here is not that of an unconscious or an unintentional misstatement but one of actual fraud, and it therefore becomes necessary for me to consider the evidence in some detail.

(1) (1853) 4 Cl. H. of L. 484. (2) (1863) 3 B. & S. 917. (3) (1892) 2 Q. B. 534.

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The circumstances connected with the application to the defendant-company and the medical examination of John Frederick Gamble are deposed to by the plaintiff, his widow, by Ray, a friend of theirs, who was in the house at that time, and by the defendant's canvasser Chunee Lall Bose. John Frederick Gamble was the captain of a river steamer plying between Calcutta and Chandbally. But he seems to have been out of employ just at that time. It is not clear, however, when he had given up work.

It is proved beyond doubt that on the night of the 18th September 1893, he left Calcutta for England in the British India Steamer *Goorkha*. Both the plaintiff and Ray state that he was going home with the object of finding employment under his brother-in-law.

Before his departure to England and on the eve of a long voyage he seems to have been anxious to insure his life. It was contended that this desire on his part implied a fraudulent intent. I shall deal with this contention later on. It is enough to say at present that he appears to have applied on the 15th September to the Positive Assurance Company for insuring his life. He was examined by Dr. Caddy for that company, but no reply was given to his application until the 23rd of September, in other words not until four or five days after he had left India. It is not clear on the evidence how he came to go to the Positive, although Mrs. Gamble does say that the same canvasser was taking him about to several companies.

On the 16th of September he appears to have been taken to Chunee Lall Bose, who at that time appears to have been acting **[609]** as the canvasser of the London and Lancashire Insurance Company as well, with the object of insuring with that company.

Chunee Lall says that he took Gamble to Mohendro Nath Bonnerjee, the doctor, employed by the London and Lancashire Insurance Company, who examined him, but it is clear that Dr. Bonnerjee's report was not submitted to his company until the 18th of September. There is nothing to show that Gamble was aware of the report made by Dr. Mohendro Nath Bonnerjee to the London and Lancashire Insurance Company, or that his application was refused by the Positive or the London and Lancashire.

It is important that the remainder of the story should be given in his own words, for a large part of the case hinges upon his evidence. "After he had been examined by Dr. Bonnerjee we all left, and Mr. Gamble told me that he could not go to any other doctor that day as he would be very much too busy and he asked me to see him at his house, somewhere near Chowringhee Lane. I believe Tottie's Lane. I don't know the number. I went there. He told me to-morrow is a Sunday, I can't go to any doctor, I will go on Monday, but on Monday he said that he was very very busy in packing things and buying things at the bazaar, if he could get a doctor at his house he would be examined. I came to the defendant-company's Office and informed Mr. Anderson that he had increased the risk another 4,000 with the London and Lancashire, and he pressed me to take a doctor to his house. I told him any doctor you can send with me. Mr. Gamble has no objection to be examined by him, and I told Mr. Anderson that as Dr. Saunders comes almost every day at 1 o'clock, I can take him with me there, to which Mr. Anderson said there is no certainty of Dr. Saunders coming. I will send for Dr. Rajendro Lall Dey and you can take him, and I took Dr. Rajendro Lall Dey at about 1-30 to Mr. Gamble to the house in Tottie's Lane."

From Chunee Lall's statements in cross-examination it appears that Gamble told him he had no time, and could not be bothered with going to any other doctor; upon which Chunee Lall said he would go to the Resident Manager of the New York, and arrange to bring Dr. Saunders to examine Gamble at his house, to which he acquiesced. Chunee Lall goes on to add [610] that Gamble also told him he would put all the amount of his insurance in the London and Lancashire, Chunee Lall then goes on to say, which fact I mentioned to Mr. Anderson, and therefore he said I am arranging with Dr. Dey to come here at 1 o'clock and you can take him. I also told Mr. Anderson that he had increased the risk in the London and Lancashire another 4,000.

Asked if Mr. Anderson was anxious not to lose Gamble for the New York, the canvasser says as follows:—

"He said to me that he did not like to lose that man. You must take a doctor to him, and he told me 'Mr. Bose take care'. Don't put all the amount of the insurance to the London and Lancashire, you must finish the examination for this office, taking Dr. Dey with you. It was one day after first seeing Gamble that I went with Dr. Dey to the house."

Chunee Lall describes how Rajendro Lall Dey was sent for and hurried off with him to Gamble's house, where the examination was held, and how afterwards the doctor handed in his report to Mr. Anderson.

Mrs. Gamble swears that on the 18th Chunee Lall called with a doctor and another Baboo (Poorno Chunder Chunder) whom she afterwards came to know as the head clerk in the Company's Office; that her husband was examined; that the doctor made notes in his pocket-book; and that her husband signed some papers, after which they left. Ray corroborates Mrs. Gamble. He also says that three Baboos, one of them being the doctor, the others the canvasser, Chunee Lall and Poorno came there that day, and that the doctor examined Gamble partly in his presence and partly in another room.

I have not the smallest doubt that the man who was examined by Dr. Dey was John Frederick Gamble, and I can only say that it was unfortunate the company should have in their written statement raised any question as to the identity of the person examined.

Although in his deposition taken on commission Mr. Anderson had distinctly stated he had no doubt that the person examined [611] was John Gamble, in his evidence in Court he materially varies his language. He was asked in cross-examination regarding the time when he showed Gamble's photograph to Dr. Dey. His answer is as follows:—

"I don't remember when I shewed it to the doctor, whether it was before or after the last interview at the office, I cannot say whether that photo satisfied the doctor that that was the man he had examined."

I don't remember now what he said when he saw the photo. I don't remember what was the result of shewing him the photo. He was then asked if he was satisfied that that was the man the doctor had examined.

His answer is "I came to no conclusion."

Asked, "Have you come to any conclusion now?" He says, "I am not prepared to say that." Asked again, "Is it your case, that a person other than Mr. Gamble was examined by Doctor Dey." He says "I cannot reply to that." I need not dwell further on this part of the case. As I said before upon the evidence of Chunee Lall, Mrs. Gamble, and Mr. Ray, I have no doubt that the person examined by Dr. Dey on the

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18th of September was John Frederick Gamble and no one else. Mrs. Gamble's story is that when the doctor came, her husband was sitting in an easy chair in the hall, the doctor felt his pulse and asked him questions the answers to which he took down in a notebook, that she called out to her husband to tell the doctor he had had fever some two years ago, and that thereupon Gamble drew out a paper from a drawer and gave it to the doctor to read. This paper is annexed to the plaint and purports to be a copy of a certificate or advertisement which Gamble had prepared with her help for one Dr. D'Mello at D'Mello's request. She goes on to say the doctor baboo turned over the pages, looked at it, and then said he was examining Gamble himself, and that it was not necessary to go further into the paper or words to that effect; that the doctor and Gamble then went into an adjoining room where there was some further examination, to which she cannot depose; after which the doctor came out and then they all left. She says also that she saw her husband signing some papers [612] which he handed to the doctor before he went away. Ray tells substantially the same story. Putting aside the question of identity which seems to have been raised in a shadowy form with the object of creating as it seems to me unnecessary difficulty, the case on the other side is that during the examination the doctor took down the statements of Gamble in the declaration form; that thereafter Gamble signed the same, and that it is not the fact that Gamble shewed to the doctor the statement prepared for D'Mello.

Poorno Chunder Chunder, who was at one time head clerk in the Company's Office, and who was present according to Mrs. Gamble at the examination, was also called on her behalf, but he was found to be adverse, and in the exercise of my discretion I allowed him to be cross-examined. He was asked whether he had not made a statement to a Mr. Thomas regarding the examination of Gamble. He denied that he had made any statement. The statement said to have been made by him were then put to him; and he denied having made them. He was then asked whether on the 4th February he had not been to the house of Mr. Cranenburgh in connection with this case, which also he denied. The statement alleged to have been made by him to Thomas, and taken down by the latter was put in for the purpose of contradicting him. I must not forget to mention that on the day previous to his examination in Court he was interviewed by Mr. Anderson in the jury room, when another statement made by him to the Company's attorney was shown to him. I have no hesitation in saying upon the evidence of Mr. Cranenburgh, Mrs. Bolst, Mrs. Gamble, and Mr. Ray that this Poorno has deliberately perjured himself in saying he did not go to Mr. Cranenburgh's house on the 4th of February. It is unnecessary to dwell further upon his evidence or upon his demeanour in the witness box, as I consider him wholly unreliable.

Mrs. Gamble's testimony regarding certain incidents, which took place in the Company's Office, on the 5th and 8th October 1894, has been challenged, and I have been asked to disbelieve her, because her statements conflict with those of the company's manager and Mr. Robertson.

[613] Excepting so far as Mrs. Gamble's credibility is concerned, the incidents referred to above as having occurred at the Company's office on those dates have, in my opinion, very little relevancy to the case, but as it is urged that her evidence regarding those matters is false, and that on those occasions she made certain statements differing materially from those made in Court, it becomes necessary to deal with the evidence on both sides relating to those matters.

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It is quite clear that until the 8th of October 1894, Mrs. Gamble was not informed in any way that her claim was disputed by the company. If I understand aright Mr. Anderson's evidence, it was not even intimated to her that any suspicion attached to her claim. In consequence of certain information furnished to him by a man of the name of Franks said to be a nominal agent of the company, Mr. Anderson seems to have got hold of the original statement or certificate by whichever name it may be called, that had been given by Mr. Gamble to D'Mello. The document appears to have come into his hands, sometime before the 4th of October 1894. It is now beyond doubt that on that day Mr. Anderson was in communication with the Solicitors of the company regarding Mrs. Gamble's claim. On the 4th of October he wrote a letter to Mrs. Gamble asking her to come to the office. The same day he appears to have gone to her house with the object, he says, of getting from her a photo of her husband. He had already succeeded in obtaining some photos of Gamble, but was not satisfied and wanted one from her. So he wrote to her (Ex. K) asking her to come to the office on the next day which she did on the 5th. She was accompanied by her sister Mrs. Bolst who sat in one room or compartment whilst Mrs. Gamble was called into Mr. Anderson's room, and here begins the divergence between the evidence on the two sides. Mrs. Gamble and Mrs. Bolst say Mr. Anderson came out and asked Mrs. Gamble to come inside his room telling Mrs. Bolst to stay where she was. Mr. Anderson says he did not say anything to Mrs. Bolst, but simply asked Mrs. Gamble to come into his room. A great deal was attempted to be made out of this difference and I will deal with this later on. Mrs. Gamble **[614]** went into Mr. Anderson's room and there found Mr. Robertson, the company's Solicitor. At that interview Mr. Robertson, it is said, showed to the lady the statement given by Gamble to D'Mello. Admittedly the paper was covered up and only Gamble's signature was shown to her, and she was asked whose signature it was, and on her replying that it was her husband's she was required to attest it. It also appears that she was asked a number of questions and her answers were taken down by Mr. Robertson on a piece of paper in red pencil which has now been produced and marked as Ex. 12, to which Mr. Robertson and Mr. Anderson attached their signatures as witnesses it seems after she had left.

It is admitted she was told nothing on that day with respect to her claim, but according to Mr. Anderson it was thought necessary to get her once more into the office, and on the 6th a letter was written (Ex. L) asking her to come again bringing with her all the papers in her possession connected with the policy. She came accordingly on the 8th with her sister who again sat outside, while Mrs. Gamble went into Mr. Anderson's room. Mr. Robertson who was there put to her a number of questions and her answers are said to have been taken down on the paper which is marked as Ex. 13. Mrs. Gamble says Mr. Robertson characterised her claim as fraudulent, and said that she had aided and abetted her husband and made herself liable to a prosecution ; that he got very angry, stamped his foot, banged the table and so on ; that Mr. Anderson thereupon tried to pacify him saying there was no need for getting angry, that, if she would make over the papers, nothing more would be said about the matter. It is said that she has deposed falsely in saying that Mr. Robertson used that language or that he thumped the table or stamped his foot. It is also said that what she said to Mr. Robertson, and what is taken down on those two papers, contradicts her evidence given in Court.

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Although Mr. Anderson in his evidence in Court has chosen to state he did not hear Mr. Robertson use the words fraudulent or aiding and abetting and so forth towards this lady, Mr. Robertson himself would not say he did not use them. The [615] following questions and answers will indicate the general character of his evidence:—

"*Q.*—After you got her statement did you consider her claim fraudulent?

A.—She was told that during the interview, I think after the statement was taken.

Q.—Did you tell her she had been trying to defraud the company?

A.—I don't recollect.

Q.—Did you tell her that she had been aiding and abetting her husband in attempting to defraud the company?

A.—I don't recollect.

Q.—Did you tell her that she had laid herself open to a criminal prosecution?

A.—No. I have no recollection of telling her that.

Q.—Could you say that you did not?

A.—I would not swear that I did not."

And in his evidence before the Commissioner, Mr. Anderson was in the same predicament; he was not prepared to vouch his oath that words to that effect were not used.

Mrs. Bolst swears she heard those words and the stamping of feet and thumping of the table. It is possible Mrs. Gamble might have construed some impatience or want of suavity natural under the circumstances on the part of the Company's Solicitor into intimidation. Personally I should be loath to think that Mr. Robertson would allow himself deliberately to use any intimidating language, but it is by no means improbable, and it very frequently happens that people use words in the heat of the moment which in their sober moments they entirely forget. I noted very carefully the demeanour of Mrs. Gamble and Mrs. Bolst and am bound to say, especially in the case of the latter, that I was very favourably impressed. I am not prepared to say simply on the recollection of these two gentlemen, a recollection of a purely negative character, that Mrs. Gamble has deposed falsely in making those statements. I am sorry to observe that [616] Mr. Anderson's recollection, excepting where it touches the facts relating to his own case, is of an extremely unretentive character. I should have abstained from saying anything on this part of the case if I had not been invited, nay pressed, to do so. I now come to those two statements which were taken down by Mr. Robertson. Neither Mr. Robertson nor Mr. Anderson will swear that before Mrs. Gamble signed those papers she read them. She swears she did not read them, and she swears that those papers do not contain her statements in the form in which she made them. Both Mr. Anderson and Mr. Robertson say they will not swear that the two documents contain the actual words she used. They say that so far as their recollection goes they merely give the purport of what she said. She was cross-examined on those two statements, and excepting the fact that she gave on one of those occasions the names of several doctors who, she said, attended her husband during his illness, which names she omitted in the claim form, there is nothing in them which requires attention. I will deal with this circumstance more fully in connection with the Ex. No. 1a.

But the value of these papers used as they are for the purpose of contradicting the witness is to my mind very little. I do not desire to make any comment more than is absolutely warranted by the circumstances of the case on the method by which they appear to have been obtained.

Mr. Robertson says that it was at the instance of Mr. Anderson that the woman was sent for. Mr. Anderson says he left the matter entirely to the solicitors, and they did whatever they thought necessary. I wish Mr. Robertson had adhered to his own original opinion and not adopted this course for obtaining Mrs. Gamble's statements.

Mr. Anderson states she was sent for for the purpose of having her case explained to her. Mr. Robertson says that he wanted to have her there for the purpose of ascertaining the truth by cross-examining her, and that appears to have been exactly what was done on those two occasions. She was cross-examined with the object of getting admissions or statements which might be used afterwards to contradict her.

[617] Although counsel was pleased to inform me that this method was often resorted to by Insurance Companies for the purpose of getting information from claimants, I am glad to find from Mr. Anderson's statements that it is the first of its kind so far as his company is concerned, and I trust it will remain the last. I must say emphatically that this method of extracting admissions does not commend itself to me.

I now come to the charge of falsehood made against the plaintiff with regard to her answer to the 9th question in Ex. No. 1a.

The question is in these words: "Name and residence of every physician who attended deceased during the year prior to his death." Mrs. Gamble's answer to this is as follows:—

"Nil. No doctors attended him during his stay in India." This answer is said to be in direct contradiction of the statement made by her to Mr. Robertson, where she named a number of doctors who had attended her husband, while he was in this country. Mrs. Gamble says she had gone with this paper to Mr. Anderson to ask him how to fill it up. There is nothing improbable in this. She states further that she understood him to say that she ought to write according to what her husband had put down. Her words are as follow:—

"Mr. Anderson sent me forms to send on to England to have them filled up by the doctors there. After those forms came from England I sent them to the company, and then I received another form for me to fill up.

(Shewn Ex. No. 1a): I believe this is the form.

After I received this form I went to the defendant-company's office with the form. I saw Mr. Anderson. I did not have any conversation with any one else there. This was on the first visit I made after receiving that form. I saw Mr. Anderson and asked what I was to do and he told me. Then I came back, I afterwards saw Mr. Anderson again in his office. No one else was present. He told me to take this form either to the Presidency Magistrate or the American Consul and swear it, but he would prefer the American Consul. I went to the American Consul.

(Shewn Ex. No. 1a).

[618] I believe this is what I signed before the Consul. I went back to the company's office and submitted the paper. Mr. Anderson was not in, and I left this with the head clerk and returned home."

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She was cross-examined at great length upon her answer to the question just referred to in Ex. 1a, and her statement to Mr. Robertson. She was asked how she came to say in her statement to the company that no doctors had attended her husband during his stay in India. She answered "I was told to agree with whatever my husband had said."

Mr. Anderson, I believe, told me that. I was interviewed by him, and he said there was a mark against I think the ninth question, and he said I would have to agree with everything my husband had said."

Asked when that was, she proceeded to add, "when I received the form from the company, I called on Mr. Anderson. I understood him to refer to the ninth question, and told me to answer according to what my husband had answered. To agree with whatever my husband had said."

Asked again "only this ninth question," she says: "That is what I understood him to say."

Mr. Anderson says he did not tell her any thing of the kind. There is nothing improbable however in her having understood him to say so.

The general result of her evidence on this branch of the case seems to me to be this. She naturally sought Mr. Anderson's help or advice in filling up the paper; he told her something which she understood to mean she must make her answer conform to her husband's statement. It is a mere matter of comprehension, and, having regard to what she says, I see no reason to disbelieve her.

Regarding the answer itself there does not seem to be any thing erroneous in substance. If the answer is read with the question, it would show that her statement related to her husband's stay, in India during the year prior to his death. Read in that way the only right and fair way to my mind, there does not seem to be any untruth in it.

[619] But as I have said already these matters are only relevant for the purpose of considering how far plaintiff's statements regarding the events which took place on the 18th of September are to be believed. She was subjected to an elaborate and minute cross-examination; and I must say that the impression it left on my mind was extremely favourable; she appeared to me to give her evidence in a remarkably satisfactory and straightforward manner.

I have no hesitation in saying that in my opinion, judging from her demeanour, she is entitled to the fullest credit. Her evidence with regard to the visit of the doctor on the 18th of September is corroborated by Ray. He is a Government servant, holds a substantial post to which is attached a pension and appears to be a respectable man. He was cross-examined at great length, but beyond the fact that he was a friend of the plaintiff, and her family, nothing was elicited to show he had any interest in this suit. And I saw nothing in his demeanour to suggest that he was deposing otherwise than truthfully and honestly. He swears positively that he was present in the house of Gamble, and remembers a visit to him "of persons from an Insurance Company before he left." I better give his account in his words. "This was the day before his departure, I saw three Baboos came down to see him. They saw Mr. Gamble. I was in the hall. That is the same place where Mr. Gamble was. Mrs. Gamble was there also. They were talking about having his life insured. He spoke of having his life insured and the Doctor Baboo took notes in his pocket book. Mr. Gamble showed him some papers. I don't know if I could identify the papers now. The Doctor Baboo read the paper. His reply was, I am examining you and I can see. Your being ill four years back does not signify so long as you are in health now. I

was in the hall. Mr. Gamble was examined in the children's room. I saw him go into the room with the doctor and I saw him come back."

The matter is made still more clear in cross-examination. He was asked how it was that Gamble came to produce the paper he showed to the doctor. His answer is distinct.

"Mrs. Gamble referred to her husband, and he drew it out of a drawer and shewed it to the doctor. Yes, I recollect that after [620] all the years. She said something to the effect. 'Jack shew that paper to the doctor' or some words to that effect. I don't remember f she said any thing about what the paper was." On what possible grounds am I to disbelieve this evidence?

Chunee Lall says the examination of Gamble took place in Tottie's Lane, that the doctor asked him questions and noted down the answers, and that he delivered the declaration personally to the manager. As I have already mentioned, he speaks of Mr. Anderson's desire not to let this life go. I can well understand Mr. Anderson's anxiety to secure him. The man was a European and ostensibly a good life, and there was no reason why Mr. Anderson should not accept his proposal.

Dr. Rajendro Lall Dey's evidence is one of the most extraordinary I have ever heard.

His report shews that John Gamble was a good life. He says he examined the urine which was found to be all right, and the man himself healthy and sound. He states he took down Gamble's answers to questions put by him in the declaration. He denies that any paper was shewn to him as is alleged by the plaintiff and Ray. To my mind the whole case turns on the question whether I am to believe Mrs. Gamble and Ray, corroborated as they are by Chunee Lall Bose, or this Dr. Dey. His manner in the witness box was most unsatisfactory. He did not seem to appreciate the gravity of the position in which he was placed. He gave his answers in a nonchalant and careless manner, as if what had happened there did not concern him in the slightest. His recollection was of the vaguest character. Beyond the fact that he examined a certain person in a certain lane he does not seem to remember anything. He does not even remember the face of the person he examined. When shewn the photograph and asked if that was the man he examined, he says he cannot say. He repeatedly says, beyond the fact of going to a certain place and examining a man he does not remember anything. He is contradicted by Chunee Lall and by Mr. Anderson on two points. Dr. Dey says that the paper he wrote out in that house he made over to Chunee Lall. Chunee Lall denies this emphatically. He says Dr. Dey took it himself and made it over to Mr. Anderson, and he adds that it is against [621] the rule of the company for a doctor to make over the declaration to any one else. Mr. Anderson says in his evidence on commission that Dr. Dey told him he had taken away the urine from the house. Dr. Dey says No; the urine was examined in the house, and that he did not take it away. I prefer to believe Mr. Anderson that Dr. Dey had told him he had brought away the urine. It also appears from Mr. Anderson's evidence, that Dr. Dey told him that he (the doctor) must have examined a different man. The doctor denies having said so. I believe Mr. Anderson. Apparently, when the doctor found himself in a fix concerning this matter, that was the only way he could get out of it and he made that statement to Mr. Anderson.

Mr. Anderson in his evidence on commission says he did not believe the doctor when he said that, and I think he was quite right, nor do I

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believe him. Now the matter is in this position: Am I to believe a man who has given his evidence in this way, that what he has recorded on that paper correctly represents the statements made to him by Gamble.

The company chooses to employ a man who shews himself wholly unable to appreciate the responsibilities of his position. He has no recollection of any material fact. Would I be justified in saying upon his evidence alone that Mrs. Gamble, Ray and Chunee Lall have deposed falsely to the most important circumstances bearing on the questions for my determination.

Mrs. Gamble and Ray say that the form was not filled up by the doctor there and then. They say that the fact of Gamble having been ill with fever was mentioned in Dr. Dey's presence, and they swear that the paper was given to him to see. He says he did not see it.

After giving my most careful consideration to the case, I have no hesitation in saying that I believe the plaintiff and her witnesses, and utterly disbelieve the doctor.

The doctor was in fact in a hurry as he himself admits. I do not believe that he filled up the form then. He evidently took down certain facts in his note-book, but what they were, does not appear. The D'Mello paper was shewn to him and he looked at it, but does not seem to have attached any importance [622] to it. He then went away, filled up the form and handed it to Mr. Anderson. The case for the defendants rests on the statements contained in that paper, which Mr. Anderson obtained from D'Mello, and which is proved to be in the handwriting of Gamble.

The plaintiff, in her statement to Mr. Robertson, and in Court, insists that paper was given to D'Mello as a puff in token of gratitude for having cured her husband of some illness. Mr. Robertson candidly admits that it looks like it, and there can be no doubt it was drawn up in that way. Mrs. Gamble says further that it is considerably exaggerated, but it does undoubtedly mention that he had been ill and had been attended by various doctors.

But if that paper was shewn to Dr. Dey and he had an opportunity of acquainting himself with its contents, then the assured placed all the facts appearing on the paper before the doctor. The defendant's case is not based upon any independent evidence. No doctor has been called to prove Gamble had been suffering from any illness which he did not disclose; nor is any one called from the hospital to prove that he ever was in hospital. Whatever fact is relied upon is contained in that paper, and the contention is that those facts were not disclosed. But if the paper was placed in the hands of the medical adviser to the company, it seems to me that the company are not entitled to say that there was any fraud, concealment or suppression of any fact. I find nothing which would justify me in saying that the assured did not comply with the condition precedent to the policies. Nor is it possible for me to say that the statements recorded by the doctor in the declaration are the statements of John Gamble.

There remain two other questions. It appears that an application form was first drawn up by Gamble and sent through Chunee Lall to Mr. Anderson; for some reason it was considered insufficient or not properly made out. Mr. Anderson then filled up the application form B, which bore the signature of John Gamble, and the answer to the ninth question is in Mr. Anderson's own handwriting. Gamble appears to

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have applied for a further policy, for which he had sent in form C. In that form there is some pencil writing in answer to question 9.

[623] Nobody can say in whose hand that pencil writing is. It certainly is not in Gamble's writing. And Mr. Anderson does not say it is his writing; but form C was cancelled and Form D was sent out from the Home Office, filled up, and presumably the pencil writing on form C was put in at the Home Office. It is unnecessary, however, to form any conjecture on that point as it is immaterial. The answer to question 9 in both B and D runs in this way: "Yes; I applied to the Sun Life Insurance Company but was not examined. I am applying to the London and Lancashire."

In considering the sufficiency or insufficiency of this answer or the suppression of any fact, it is necessary to bear in mind what question 9 is. That question is in these terms: "Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for? If so, state particulars to what Company, when, &c." And the contention on behalf of the company is that on the 15th of September he had applied to the Positive Company, and that he did not mention this in his answer. It will be seen from what I have already stated that when there is any ambiguity in any question it is to be construed in favour of the insured, and therefore if the question had been at all ambiguous, I should have been justified upon the cases in construing it in favour of the assured, but is there any ambiguity? What is wanted in the question is information on the subject of any application which has had some result in a particular way, *viz.*, whether there has been an application upon which a policy has not been issued, or if it has been issued, it has been at a higher rate. The reason of the question is plain. It is to give the company information of the fact of his having applied and been found ineligible or so risky as to require him to pay a higher rate. He is not called upon to mention an application which has been made but which has had no result. If the evidence of Mr. Anderson is closely examined, it will be seen that this is the true reason why he did not send for the papers from the London and Lancashire; although he does try at one stage to explain it away by saying that he understood from the answer that the application to the London and [624] Lancashire was not completed. And he went on to say that he thought the application had not been sent, but that Gamble only intended to apply. It is difficult to conceive how he could have understood the answer in that sense in the face of Chunee Lall's distinct statement that he had told him Gamble had applied to, and wanted to, put all his insurance in the London and Lancashire, and that Anderson wanted him to prevent this.

I therefore hold that Gamble was not bound to state in his answer that he had applied to the Positive, and that his not mentioning the fact does not amount to a breach of the warranty so as to avoid the policy. It was also said that Gamble was suffering from albuminuria. There is nothing to shew that he was ever treated for this disease, or that he had any knowledge that he was suffering from a disease of that character. I have referred to the language of Lord Watson on the question of latent diseases Dr. Mohendro Nath Bonnerjee in answer to a question put by me stated that the symptoms are distinct in an acute stage, but he admitted that he did not see the man in an acute stage of the disease. I find it impossible to hold that a man who did not know he was suffering from a disease committed a breach of warranty in saying

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nothing about it. The case of *Anderson* v. *Fitzgerald* (1) is different to this.

I think the present case comes within the words of Lord Watson. Moreover, Dr. Rajendra Lall Dey, who was employed by the company to examine the man, did not find any albumen in his urine. If he had found it, but did not mention the circumstance in his report, the company, in my opinion, would have been fixed with imputed knowledge through their agent. If the doctor was misled, and I must assume that he was, for otherwise he could not have made an erroneous statement of that character, surely the assured could not be presumed to know of the presence of the disease in his system.

I have no doubt upon the evidence of Mrs. Gamble and Ray that Gamble was going to England in search of employment; and it is clear that before his departure he had applied to two other offices to ensure his life. Learned counsel for the defendants [625] urged me to draw an inference of fraudulent intention from that circumstance. In my opinion there is no reason whatsoever for presuming fraud. The man was going away on a long voyage, and was naturally anxious to make some provision for his family. He was evidently thinking of employment in foreign parts, as appears from the addition to the policy, by which he was allowed in consideration of an extra premium to go as mariner to any other part in the world, except the west coast of Africa. Although I admitted the applications made to the Positive and the London and Lancashire to shew that he had been applying to two other companies at or about the same time when he applied to the defendant-company, I repeat I do not think there is any ground whatsoever to justify one in saying there was any fraudulent intention on his part. On the contrary to me it seems he was actuated by a natural desire to make some provision for his family.

Nor does the fact that he died a few months after give rise to the inference that he knew his life was doubtful. The circumstances lead me to a totally different conclusion; I am inclined to believe that he thought he had a long life before him. The conclusion therefore at which I have arrived is this, I hold that the non-mention in his proposal to the defendant-company of his application to the Positive was not required by the question, and therefore it does not amount to a breach of warranty. I hold further that on the evidence it is impossible to say that the declaration filled in by Dr. Dey represents the statements made to him by Gamble; in other words they appear to me to be the doctor's own version of what he was told by Gamble.

I further hold that the doctor was shewn the copy of the statement given by Gamble to D'Mello.

Upon these findings I hold that there was no breach of warranty, and that the plaintiff is entitled to recover. There will be a decree in her favour for the amount claimed with costs on scale No. 2 and interest at six per cent.

Judgment for the plaintiff.

The defendant company appealed.

Mr. *Garth* (Mr. *Knight* with him), for the appellants.—The [626] lower Court put the *onus* of proof on the company, although it was admitted by the other side that the declaration was signed by Gamble.

The Court held that the fact of its being signed by Gamble did not affect the *onus*; it was on the company to prove Gamble made the

(1) (1853) 4 Cl. H. of L. 484.

statements set out in the declarations, and that those statements were untrue. **1900 JAN. 10.**

The Court, I submit, was wrong; the *onus* lay on Mrs. Gamble and not on the company. APPEAL FROM ORIGINAL CIVIL.

This suit was brought just as the period of limitation was about to expire, and the story now put forward by the other side as to the form being signed by Gamble before it was filled in was thought of then for the first time. No such story was thought of five years before when she put forward her claim. **27 C. 593.**

The statements and representations made by Gamble form the basis of the contract. How can Mrs. Gamble put these on one side and yet hold the company liable? Gamble was bound by the statements appearing under his signature, and Mrs. Gamble was not entitled to go into evidence to show he did not make them. Supposing the allegation made by Mrs. Gamble is true, and the D'Mello puff had been shown to the company's doctor, it cannot affect the company. The terms of the contract are clear. No information or representation given to any one would bind the company, unless reduced to writing and presented in the application to the Home Office.

Upon the facts as found, the company, I submit, is entitled to judgment.

Mr. *Sinha* (Mr. *Dunne* with him), for the respondent.—The agreement must be read with the provision in the policy itself, that does not refer to the Medical Examiner's report. What Gamble warranted were the statements and replies in the application itself, and do not include the declarations made to the Medical Examiner.

The declaration must have been written by the doctor from the notes taken by him in his book. The words "any other person" in the application do not include the Medical Examiner, whose report has been dealt with before.

[627] If there was a warranty of every representation I admit there has been a breach.

With regard to the disease of the kidneys knowledge in Gamble must be proved before it can be said there was any breach of warranty, *Thomson* v. *Weems* (1). Are these the declarations of Gamble? The signature is in different ink to the rest of the document. What I suggest is the doctor did not go through the form of asking all the questions in the declaration.

Cur. adv. vult.

JUDGMENT.

JANUARY 10th, 1900, MACLEAN, C.J.—This is a suit to recover from the defendant-company a sum of Rs. 10,500, the amount assured on five policies on the life of the plaintiff's late husband, one John Frederick Gamble, a master mariner, which policies were effected with the defendant-company in the month of October 1893. John Frederick Gamble who, for several years, had been resident in Calcutta, died in England in the month of April 1894 of disease of the kidneys. The policies are granted by the company "in consideration of the agreements, statements, representations, and warranties submitted to its officers at the Home Office in the City of New York in the written applications for the policies, which are hereby referred to and made part of this contract."

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(1) (1884) L. R. 9 App. Cas. 671.

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For these policies John Frederick Gamble made application to the company on the 16th and 18th of September 1893. On the 19th September he set sail for England. The applications were in writing in the form usually adopted by the company and were signed by John Frederick Gamble. The portions of such applications, material for the purpose of the decision in the case, are question 9 and the answers thereto. Question 9 runs as follows:—

"*A.*—Has any proposal or application, to insure your life ever been made to any company or agent, upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for?"

B.—"If so, state full particulars, to what company, when, and etc."

[628] The answer is: "Yes, I applied to the Sun Life Insurance Company, but was not examined. I am applying to the London and Lancashire." The answer says nothing about an application to the Positive Life Assurance Office, which undoubtedly had been made by Gamble. The application contains the following agreement by Gamble. "I do hereby agree as follows:—

(1) That the statements and representations contained in the foregoing application, together with those made to the Medical Examiner by me, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand, or not: this warranty being a condition precedent to, and a consideration for, the policy which may be issued hereon.

(2) That, inasmuch as only the officers at the Home Office of said company, in the City of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy or by or to any other person, shall be binding on said company or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the said company at the Home Office in this application."

John Frederick Gamble was examined by the Medical Examiner of the defendant-company, a certain Dr. Dey, on the 18th September 1893, and on that day he undoubtedly signed the declaration made to the Medical Examiner, Dr. Dey. (Ex. E.)

By that declaration he declared that he had not, since childhood, had disease of the kidneys or disease of the urinary organs; and in answer to the question "Give full particulars of any illness you may have had since childhood," he replied, "except a few attacks of biliousness, I had no other illness," and in reply to another question "When were you last confined to the house by illness?" he declared, "I was never confined to the house." In reply to question 4 "Are you subject or predisposed to dyspepsia?" he answered "No;" and in reply to question 6. "Have you **[629]** ever been seriously ill?" he answered "No;" and to question 7. "Name and residence of your usual medical attendant," he replied "no fixed medical attendant:" and in reply to the question "Have you consulted any other medical man, if so, when and for what?" he answered "No." Upon that application and declaration, the life was accepted and the policies in question were granted.

As I have stated, John Frederick Gamble died in England in the following April of disease of the kidneys. A claim was subsequently made

against the company by his widow, the present plaintiff, as the person entitled to the benefit of the assurance for the amount mentioned in the policies. The company appear to have had their suspicions aroused as to the truth of the statements in the applications and declaration, and in consequence two interviews took place on the 6th and 8th October 1894 at the office of the company in Calcutta, between the plaintiff and Mr. Anderson, the defendant's manager in Calcutta, and their solicitor Mr. Robertson. I shall have to refer later on to these interviews somewhat more in detail, but for the moment, it is sufficient to say that the plaintiff was then told that her claim would not be admitted, and that the company regarded the transaction as a dishonest, if not a fraudulent, one.

Nothing more was heard of the matter by the company, until nearly two years after, namely, on the 28th of September 1896, when a Mr. Cranenburgh, a pleader of the Presidency Magistrate's Court, wrote, on behalf of the plaintiff, to Mr. Anderson, the letter (Ex. 2), in which he demanded immediate payment of the amount due on the policies with interest, and stated that, in default of immediate payment, proceedings would be taken for recovery of the money. The defendants' solicitor at once replied repudiating liability on the policies, but this suit was not instituted until the 22nd of April 1897.

I will now refer to paragraph 8 of the plaint which is in the following terms: "The defendant-company's forms connected with the said application for said policies Nos. 566820, 566821, and 566822, including the printed form of application for insurance, and the printed form of declarations to the Medical Examiner of the defendant-company were brought to the house [630] of the said John Frederick Gamble on the 18th September 1893, by one Chunee Lall Bose, who was employed by the defendant-company as a canvasser, and a native doctor, whose name the plaintiff does not recollect, who was employed by the defendant-company to examine the said John Frederick Gamble and to take the said declarations. The said form of application was then and there filled up, and signed by the said John Frederick Gamble and was retained by the said Chunee Lall Bose. The said native doctor then examined the said John Frederick Gamble in a separate room, and when the examination was finished the said form of declarations to the Medical Examiner was signed by the said John Frederick Gamble, but to the best of the plaintiff's recollection and belief without being filled up, but being retained by the said native doctor to be filled up by him and forwarded to the defendant-company's office. The said native doctor made notes in a note book of his, as the plaintiff believes the result of his examination of the said John Frederick Gamble, and of the information obtained to enable him to fill up the said form of declarations. The said John Frederick Gamble had by him at the time a statement drawn up by himself sometime previously of an illness, from which he had suffered during the years 1888—1891, and of which he had been cured by one Dr. D'Mello, by some medicine invented by the latter, and this statement the said John Frederick Gamble showed to the said native doctor then and there, and informed him what it was, and the said native doctor then and there read it (a copy of the said statement is annexed hereto and marked *B*), and the plaintiff prays that it may be taken as part of her plaint; the said statement had been drawn up by the said John Frederick Gamble by way of a puff or commendation of the medicine with which the said Dr. D'Mello had treated and cured him as aforesaid, and which the said Dr. D'Mello intended to patent."

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In their defence the defendant-company state that the policies were granted upon the faith of the statements and representations made to the defendants by the assured, both in his application and in his declaration to the Medical Examiner, and they rely upon the warranty contained in his applications; they charge that certain of those statements and representations were untrue; they deny *in* **[631]** *toto* the allegations in paragraph 8 of the plaint; and do not admit that their Medical Examiner ever examined the assured. I may dispose of the latter point at once by saying that it has not been insisted upon.

The case came on for trial before Mr. Justice Ameer Ali, and after lasting many days the learned Judge gave judgment in favour of the plaintiff. Hence the present appeal by the company.

Passing by, for the moment, the question of whether or not it is open to the plaintiff, in the face of the contract between her late husband and the company, to adduce evidence in support of the allegations in paragraph 8 of the plaint, and taking it that the plaintiff is bound by the terms of the contract between Gamble and the company, I will, first, consider whether the statements and representations made by the assured, both in his applications and declaration to the Medical Examiner, were, or were not, true. I need not go into this question much in detail, for substantially, it has not been denied by the respondents that certain of such statements and representations, sufficient to vitiate the policy, were, in fact, untrue. There cannot, I think, be any reasonable doubt, that, at the time of making the applications, the assured was suffering from disease of the kidneys and urinary organs; that he had been subject to dyspepsia from 1888 to 1891; that he had suffered from the illness described in Ex. B to the plaint; that he had been frequently confined to the house through illness, and had also been in hospital; that he had consulted several medical men, and especially a certain Dr. D'Mello and that he had made an application to insure his life in the Positive Government Security Life Insurance Company, and had been examined by the said company's Medical Examiner, of which he says nothing in answer to question 9 in the application.

As regards the disease of the kidneys and urinary organs, it is urged that this was a latent disease, and that there is nothing to show that the assured was conscious of its existence at the time he made the representations, and, in support of this reliance is placed upon a passage in the judgment of Lord Watson in the case of *Thomson* v. *Weems* (1) where that most learned **[632]** and distinguished Judge says: "Both these authorities relate to internal disease, of the existence of which the person affected is unconscious, and which medical examination cannot detect, until he is *in extremis* or, it may be, until life is extinct; and the only point arising for decision was, whether a particular query or statement was so expressed as to include latent and unknown, as well as apparent and known diseases."

I much question whether those observations can apply to the case of disease of the kidneys or disease of the urinary organs, of which, when it had reached such a stage as in Gamble's case, it seems unlikely that the patient could be quite ignorant when he made his applications and declaration, and in this connection, it must be remembered that the witness Dr. Mohendra Nath Banerjee, in answer to the following question from the Court:—"Could all the symptoms you have put down there have been

(1) (1884) L. R. 9 Ap. Cas. 671, (694).

known to the man himself" replied, "The symptoms of Bright's disease should be known to him. The quantity of urine would be abnormal, and in the acute stage of the disease, he would pass blood and there are various other things. I did not see him in an acute stage."

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The plaintiff tells us that her husband suffered from dyspepsia, and there cannot, I think, be any doubt, in the face of Ex. B to the plaint, a document which, admittedly, was signed by Gamble, that the declaration that, with the exception of a few attacks of biliousness, he had no other illness, and was never confined to the house, were absolutely untrue. It is again very difficult for the plaintiff to explain away the negative answer to the sixth question in the declaration made to the Medical Examiner: "Have you ever been seriously ill?"

It is urged that the answers to questions 7 and 8 in that declaration are sufficiently accurate, and that, "inasmuch as the words used are ambiguous, they must be construed *contra proferents* and in favour of the assured," adopting the language of Lord Watson in the case to which I have referred. The contention is, that, as in answer to question 7, the applicant said he had no "fixed" medical attendant, not perhaps a very ingenuous answer—the question, "Have you consulted any other medical man?" must mean a medical man other than a fixed medical attendant [633] and, as he had no "fixed" medical attendant, he was truthful and justified in saying that he had not consulted any other medical man. This argument is replete with casuistry, and seeing that we are dealing with a case of a person applying for an insurance on his life, a situation demanding from him the disclosure of all material facts within his knowledge, it does not impress me favourably.

The same species of reasoning applies to his answer to question 9 of the application, in which answer he says nothing about his application to the Positive Life Insurance Office, the argument being that the words "upon which a policy has not been issued," mean "a policy which has been refused." I do not propose to go into this, as to my mind the mis-statements and mis-representations made by the assured are amply sufficient to warrant the company in avoiding the policy.

If, then, the matter rested here, the defendants are bound to succeed. But it is urged for the plaintiff, first, that it is open to her to show that Gamble signed the declaration to the Medical Examiner before it was filled up; and that, in consequence, he is not responsible for the contents of that declaration and is not bound by it; and secondly, that he showed to the Medical Examiner his written statement to Dr. D'Mello, and that the Medical Examiner must be taken to have known of the contents of that statement, and that the knowledge thus acquired by the Medical Examiner must be imputed to the company.

I am unable to take that view, having regard to the agreement of the assured with the company. He agreed that the statements and representations contained in his application, "together with those made to the Medical Examiner by me," should be the basis of the contract between the parties. He warranted them to be full, complete, and true, whether written by his own hand or not, and that the warranty was to be a condition precedent to, and a consideration for, the policy which might be issued thereon.

Now the plaintiff says she is entitled to resile from all this, to show that Gamble did not state what under his own signature he declared to be true, and yet to hold the company liable on the [634] policy brushing

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aside and treating, as of no import whatever, the statements and representations which form the very basis of the contract.

But Gamble's agreement did not stop here; there is another and an extremely important feature in it. He agreed for the reason which is recited, that no statements, representations, or information made or given by, or to any person soliciting or taking the application for the policy, or by or to any other person, shall be binding on the company, or in any manner affect its rights unless such statements, representations, or information be reduced to writing and presented to the officers of the said company at the Home Office, in the application.

This being the bargain between the two contracting parties, are we to say that all this means nothing, that these terms were not binding on the assured, and that they are to be treated as against him as so much waste paper? I think not. The object of such clauses is obviously to provide against a case of the very class which is now set up by the plaintiff; to prevent those claiming under the assured from going behind his written declarations which are the very basis of the contract. If it were otherwise, it is difficult to see how any certainty in contracts of this class would be afforded to the assuring company, or how, in many cases, as in the present case, heavy and prolonged litigation between the assured and the company is to be avoided. For my own part, I should have thought and think that, when the company had put in the contract between the parties, and shown, as they did, that, in important particulars, many of the statements and representations made by the assured were untrue, there would have been an end of the plaintiff's case. The learned Judge, however, in the Court below, has thought otherwise, and has allowed the plaintiff to go into evidence in support of her allegations in paragraph 8 of her plaint, and has not noticed the argument as to whether or not she was entitled to do so in the face of the contract between the parties.

I will therefore—though in the view I take it is not strictly necessary—now deal with that evidence, premising that in my opinion the plaintiff's story ought to be most carefully analyzed, and that she ought not to succeed unless, in the face of the documents [635] signed by Gamble, her case be established by clear and cogent testimony. I am bound to say that her story strikes me at the outset as a somewhat suspicious one, and that suspicion is not diminished by the consideration that it has never even been suggested until the filing of the plaint, although some two and-a-half years before that date the plaintiff had been virtually told that the claim was a dishonest one, and that it would not be admitted. We hear nothing of this story at the interviews in October 1894, when the plaintiff's claim was challenged, nothing of it during the long silence between that date, and Mr. Cranenburgh's letter two years later, nothing about it in that letter, and nothing about it until after Dr. D'Mello's death.

I will now pass to a consideration of the evidence, with the view of ascertaining and determining what really took place at the interview of the 18th of September 1893, for this is the crucial question, and in dealing with this evidence, it is necessary to bear in mind that the witnesses are speaking to an event which occurred nearly six years before the date when they were giving their evidence, a circumstance to which any discrepancies in that evidence may not unfairly be attributed. Dealing first with the question of whether or not the declaration was filled in when Gamble signed it, the plaintiff can tell us but little. She merely says that her husband sat at the desk and took up the pen to write something, but she did not know what he wrote. This, to my mind, carries

her case no way at all, whilst all that the witness James Ray can say in his evidence-in-chief, is that, on the date in question, Mr. Gamble signed some papers in his presence, and that is all that he can say about the forms, though, no doubt, in answer to a question by the Court, the question being "Besides making any notes in the pocket-book, did the doctor write on any forms;" he said, "No, I only saw Mr. Gamble sign some papers."

If this evidence stood alone it would not justify us in concluding that the answers in the declaration had not been filled in by the doctor before Gamble signed it, quite apart from the positive evidence of Dr. Dey, who distinctly says that the declaration was signed in his presence, after he had filled up the form, which would be in accord with the usual practice in such cases.

[636] In dealing with the evidence I am not unmindful of the fact that the learned Judge in the Court below enjoyed the great advantage of seeing the witnesses, and so far as anything turns upon their demeanour, we must be cautious in not differing from the opinion of the learned Judge who tried the case. The learned Judge appears to have formed a very favourable impression of the plaintiff as a witness, and an equally unfavourable one of Dr. Dey; he says that he utterly disbelieves the doctor. So far as one can judge from the way the latter gave his answers, as we see them in print before us, this sweeping denunciation might appear somewhat unmerited, but, upon the demeanour of the witness, the Judge in the Court below is in a position to form an opinion which we are not. No doubt in answer to questions repeated by the Court, as to his recollection of what passed on the occasion, the doctor said that he remembered very little about the case, though there is force in his observation that it was very difficult to remember when the transaction took place so long ago. But, taking the evidence of the plaintiff and the witness Ray, who is in a somewhat humble position in life, I think that it is impossible to hold that the plaintiff had substantiated that the declaration was filled in after Gamble had signed it.

I now pass to the question as to whether Gamble's statement to Dr. D'Mello was shown to Dr. Dey. The plaintiff, in her evidence-in-chief, says: "The doctor took this paper in his hand and looked at it; whether he read it he looked at it and turned it over. I said that does not matter."

To the Court.—*Q.*—Do you believe he read it?

A.—Yes, he looked at it and turned it over.

To Mr. Gregory.—I did not hear the doctor say much. On the paper being shown, he said to my husband: "I am examining you, it's all right," and he returned the paper to him. And in cross-examination she says:—

Q.—Was there anything untrue in the statement?

A.—Not untrue, but exaggerated. Made to appear bad, when it was not quite so bad.

Q.—Merely the symptoms of the illness were exaggerated, nothing more?

[637] *A.*—No, nothing more. I did not hear any of the answers of my husband to the questions put by the doctor Baboo.

Q.—Do you still suggest that Dr. Rajendra read through the statement and then filled up the form as it is?

A.—He looked at it. He may have glanced or he may have read.

The Court.—You think he read it?

A.—Yes, he had a look at it.

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Taking her answer as a whole the witness is, I think, very hesitating in saying that the doctor read the statement.

Ray says:—

Q.—Did you hear what transpired?

A.—About insuring his life. They were talking about having his life insured. He spoke of having his life insured, and the doctor Baboo took notes in his pocket-book. Mr. Gamble showed him some papers. I don't know if I could identify the papers now. The doctor Baboo read the paper. His reply was:—"I am examining you and I can see; your being ill four years back does not signify, so long as you are in health now." That is not a very definite statement, and does not amount to much more than that the doctor read some paper. In cross-examination he says:—

"Yes, but I had not read it. I had seen it with Mrs. Gamble in her hands. That was when she was going to the company backwards and forwards. Then it was that I saw this paper."

Q.—I asked you if you had ever seen it before that occasion when the doctor was there?

A.—No, I had not.

Q.—How did that come to be produced on that occasion?

A.—Mrs. Gamble referred to her husband, and he drew it out of a drawer and showed it to the doctor. Yes, I recollect that after all these years. She said something to the effect "Jack show that paper to the doctor," or some words to that effect. I don't remember if she said any thing about what the paper was.

He says that Dr. Dey was some 10 or 15 minutes reading it all through, the plaintiff says, five minutes or so. Dr. Dey **[638]** denies that he ever saw the paper. But apart from Dey's evidence, to my mind, neither the evidence of the plaintiff nor of Mr. Ray is sufficiently convincing to warrant us in finding that the written statement to Dr. D'Mello was ever read by Dr. Dey, even if it were ever shown to him. It is almost incredible that if it had been so shown and read, the plaintiff should, under the circumstances, have kept back the fact for so long a time from the company. I am quite unable to accept the story now set up by the plaintiff and I have formed a very adverse opinion as to the honesty of her case, and the honesty of the transaction on the part of her late husband. The other witnesses called do not appear to have thrown much light on this part of the case. I think it is a very fair inference from all the circumstances of the case, that this story about the statement to Dr. D'Mello having been shown to Dr. Dey on the 18th September 1893 is a mere after thought, consequent upon the plaintiff's knowledge acquired at the interview of October 8, 1894, that that statement had reached the hands of the company. As I have pointed out nothing was heard of this story until after Dr. D'Mello's death.

In the view I take, it is not very important to deal minutely with the evidence as to what took place at the interviews of the 6th and 8th October 1894, nor to express any opinion as to whether, or not, Mr. Anderson and Mr. Robertson were well advised in seeking or having those interviews. That the plaintiff, at those interviews, signed the Exs. No. 12 and No. 13 cannot be questioned, though she alleges that at the time she was quite stunned and confused, and that they were not voluntarily made by her. As regards Ex. No. 12 the plaintiff admits that she did make the statements in that paper to Mr. Anderson, and goes on to say that those statements are in point of fact true, one of those statements being that

her husband had been eighteen years in India, and that during that period he had never been attended by any doctor. This obviously is incorrect, and I am unable to place any credence upon the plaintiff's statement that her answer to question 9 in Ex. No. 1-*a* was given, because Mr. Anderson said she must agree with everything her husband had said. Except as going to the credibility of the plaintiff, it does not appear to me that what she stated on the [639] 6th or 8th October is of much materiality upon the real issue of fact which we have to decide, namely, as to what occurred on 18th of September 1893.

I may notice in passing, that in the letter of the 28th of September 1896, written about two years afterwards, Mr. Cranenburgh says nothing about the plaintiff being stunned or confused at the interviews in October 1894, he rather implies that she was quite able to take care of herself, and that she easily saw through the so-called ruse of Mr. Anderson.

It is unnecessary, having regard to my opinion on the case, to decide whether the declarations made by Gamble to the London and Lancashire and Positive Offices were admissible in evidence in this case, though the inclination of my opinion having regard to the issues involved is that they were.

Upon these grounds the claim of the plaintiff absolutely fails; her suit must be dismissed with costs and she must pay the costs of this appeal.

MACPHERSON, J.—I agree.

HILL, J.—I also agree.

Attorneys for the appellants: Messrs. *Orr*, *Robertson* and *Burton*.

Attorney for the respondent: Mr. *E. J. Fink*.

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27 C. 639 (P.C.)=27 I.A. 1=2 Bom. L.R. 562=4 C.W.N. 429=7 Sar. P.C.J. 648.

PRIVY COUNCIL.

PRESENT:

The Lord Chancellor, Lords Hobhouse, Morris, Davey, and Robertson, and Sir Richard Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

HARANUND CHETLANGIA (*Plaintiff*) *v.* RAM GOPAL CHETLANGIA AND ANOTHER (*Defendants*). [10th and 15th November, and 9th December, 1899.]

Evidence Act, 1872, *ss.* 65, 66, 74, 79, 86—*Foreign State, judicial proceedings in—Record not certified as specified in s.* 86—*Secondary evidence—Public document, contents of, s.* 74.

The record of proceedings in a Court of Justice is presumed to be genuine and accurate, if it is certified as directed by s. 86 of the Evidence Act.

But the proceedings may be proved by an official of the Court speaking to what takes place in his presence and also to an uncertified record thereof.

[640] The latter thereby becomes secondary evidence under ss. 65 and 66 of the certified record (being a public document under s. 74) admissible without notice to the adverse party when the person in possession thereof is out of the jurisdiction.

[R., 34 C. 576 =6 C.L.J. 30 (35)=11 C.W.N. 622.]

APPEAL from a decree (4th April 1894) of the High Court, affirming a decree (30th November 1891) of the Subordinate Judge of Nuddea.

1899
DEC. 9.
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PRIVY
COUNCIL.
—
27 C. 639
(P.C.)=
27 I.A. 1=2
Bom. L.R.
562=4
C.W.N. 429=
7 Sar. P.C.J.
648.

The appellant, a minor on the 31st August 1888, sued on that date by his adoptive mother and guardian, Chuni Bibi, both being then resident at Goari, Kishnagar, in the Nuddea division of Bengal, for his, the minor's, share of property valued at more than four lakhs, basing his claim on an alleged adoption as son to the late Shib Narain Chetlangia, who died there in June 1877. The first respondent and first defendant was the only brother of Shib Narain. Both the brothers were the sons of Ram Buksh Chetlangia, deceased in 1884, who left also a widow, Jodhi Bibi, the second respondent. To the latter Ram Buksh by his will, proved on the 14th October 1884, left part of his property, leaving the residue to his son Ram Gopal.

This Chetlangia family was first settled in Sikhar, in the talukh of the Raja of Sikhar, in Jeypur territory, whence Ram Buksh came to Bengal about the year 1855. After Shib Narain's death, Chuni Bibi returned to Sikhar. She purported to adopt the plaintiff, under an authority from her husband to adopt a son to him.

That she had no such authority was decided on this appeal. There had been a suit brought at Sikhar by Ram Buksh against Chuni Bibi, in consequence of her attempt to adopt the plaintiff. It was also decided incidently to the main question on this appeal, that although no copy of those proceedings in a foreign Court, certified in accordance with s. 86 of the Evidence Act, I of 1872, by the Political Agent at Jeypur, was produced at the hearing of this suit, still the evidence given as to the proceedings that had taken place in the Court at Sikhar, given by an official of that Court who was present, with his further evidence as to a copy of the recorded proceedings, which copy he produced, was admissible evidence.

The plaint stated that for several years after the adoption, Chuni Bibi and the plaintiff lived together in Sikhar, but in **[641]** August 1880 they came to Bengal, and lived with Ram Buksh as a joint family till the 7th March 1883, when Ram Buksh excluded the widow and the adopted son, the plaintiff, who now claimed his adoptive father's share in the joint family property, asking for partition and an account.

The first defendant denied in his written statement both the fact and the validity of the adoption. He denied that the widow had authority from Shib Narain for making the adoption. He relied on the proceedings in Jeypur as conclusive against it.

The issues raised questions whether Chuni Bibi had authority to adopt, and whether the adoption had been valid according to the custom in such matters in Jeypur; also as to the effect of the proceedings in that State. The nature of the property, whether ancestral or self-acquired by Ram Buksh, was also in issue.

The Subordinate Judge was of opinion that by the Mitakshara law, as it prevailed in the State of Jaipur, and in Sikhar within that State, an authority to adopt given by a husband could not be legally carried out by his widow without the assent of the head of the family. He recorded no finding as to Shib Narain's authority, but found that Ram Buksh had never consented to the exercise of such an authority by his widow. He therefore held that the adoption was invalid. Upon an issue as to the quality of the property claimed he found that none of it was the joint property of Shib Narain and Ram Buksh, but was the self-acquired property of the latter. He found that the business at Goari was not an ancestral joint-family business, and that Shib Narain only assisted his father in it, without having a share. For these reasons he dismissed the suit.

1899 DEC. 9. — PRIVY COUNCIL. — 27 C. 639 (P.C.) = 27 I.A. 1 = 2 Bom. L.R. 562 = 4 C.W.N. 429 = 7 Sar. P.C.J. 648.

On the plaintiff's appeal to the High Court, a division bench (PRINSEP and AMEER ALI, JJ.) maintained the decree of dismissal, stating their reasons in separtate judgments. Both the Judges declined to accept the proceedings in the Sikhar Court, including the final order disallowing the alleged adoption, as conclusive against its validity, or against the fact of its having been effected. They considered the fact that no record was in evidence before them certified by the Political Agent under s. 86 of the Evidence Act, 1872. The absence of the [642] certified record rendered the whole set of documents relating to the proceedings in Jeypur inadmissible, according to the judgment of the one Judge, and rendered proof of the jurisdiction defective in the opinion of the other. On the main question of the asserted authority to adopt having been given by Shib Narain to the wife to be exercised by her after his death, both the Judges decided that there was no sufficient evidence in proof of it. As to the necessity for the widow's having had the assent of the head of the family, Ram Buksh, the Judges were not in complete accord. Both of them, however, concluded that the authority from the husband, Shib Narain, which was necessary to give validity to the widow's act of adoption, had not been established as having been given by him. The adoption, therefore, failed.

Mr. *J. H. A. Branson*, for the appellant —There has been sufficient evidence of the husband's having given his authority to the wife, to adopt after his death, to warrant the finding that the widow's adoption was good and valid. The Courts below should have taken that view. It has not been proved that the refusal by Ram Buksh to consent that this adoption should take place was, by a custom governing the parties, sufficient to invalidate the adoption by the widow under the authority of her husband. Such a custom would not be in accordance with the Hindu law of adoption according to the Mitakshara.

The Right Hon'ble *H. H. Asquith*, Q. C., and Mr. *J. D. Mayne*, for the respondent.—On the evidence the authority to adopt has not been proved to have been given by the husband. That defence derived support from the proceedings at Sikhar, which showed that Ram Buksh had opposed the widow's attempt to adopt. The evidence of those proceedings had been erroneously excluded as inadmissible, on the ground that the copy of the record had not been certified within the terms of s. 86 of the Evidence Act, 1872. Although there was no certified record produced, there was the primary evidence of a witness who stated the proceedings that had taken place in his presence, and had, with knowledge of the writer's handwriting, whom he knew to be one of the amlas of the Sikhar Court, testified to the correctness of the copy, thereby rendering it secondary evidence of the contents [643] of the record. They referred to ss. 65, 66, 74, 79 of the Evidence Act. Section 86 only prescribed one mode of proving the record of a foreign judicial proceeding which did not exclude all others.

Mr. *J. H. A. Branson* in reply.

JUDGMENT.

1899, DEC. 9th.—The judgment of their Lordships was delivered by

LORD HOBHOUSE.—The plaintiff, now appellant, is suing to recover a share of the estate of Ram Buksh, who died about the year 1884. He alleges that Chuni Bibi, who was the widow of Shib Narain, the eldest son of Ram Buksh, adopted him to be the son of her husband after his death, which took place in the year 1877. It is not disputed that in point of

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form the adoption took place; but the defendants deny that Shib Narain gave his widow any authority for that purpose. Unless the plaintiff can prove that she had such authority, his suit must fail. It has failed in both the Courts below, and at this Bar the argument has been confined to the one question: Had the widow authority to adopt or not?

The Subordinate Judge dismissed the suit on another objection, which need not now be dwelt on. In the High Court Mr. Justice Prinsep throws serious doubt on the evidence given to prove that Chuni Bibi had authority, but he does not rest his own judgment finally on that ground. He considers that the parties are governed by the law of their domicile, which is in the State of Jeypore, and that in Jeypore there prevails a local custom to the effect that a widow cannot adopt without permission both from her husband and from the head of the family, for the time being. Ram Buksh was the head of the family, and so far from permitting the adoption, he strongly opposed it.

The other Judge was Mr. Justice Ameer Ali. He thinks that the evidence given to establish the local custom alleged by the defendants is not sufficient. He supports the decree below on the ground that the plaintiff failed to show any authority given by Shib to Chuni Bibi. In his view the utmost that the evidence can prove in favour of the plaintiff is that Shib may have suggested to his wife to adopt a boy, who would be chosen by his father Ram Buksh.

[644] Besides the evidence of Chuni Bibi herself, Mr. Branson has laid before their Lordships the evidence of four witnesses: three of them being uncles of Chuni Bibi, and the other a cousin. It is very far from precise. With regard to three of these witnesses, named Rurmal, Bridhi, and Chota Lal, what they say rather suggests that Shib Narain was desirous that a boy should be brought to himself for adoption, preferably by his father Ram Bux, and failing his father should be brought by his wife. The language ascribed to him is not that of a man conferring an important authority on his wife. The other witness, Sadasak, speaks more definitely of permission. His evidence-in-chief is as follows:—

"About a month and-a-half after Shib Narain's coming to Calcutta, one day, at about 11 or 12 o'clock of the day, I was seated near Shib Narain, when Chuni Bibi seeing Shib Narain vomit a large quantity of blood, began to cry. Upon this Shib Narain said, 'My father said that he will get you a boy, if he does not get you a boy, you take a boy and preserve my family (name), I give you permission.' Shib Narain said this to Chuni Bibi in the presence of every one."

From his cross-examination it appears that no body else said anything except Ram Buksh, who said to Shib "May God restore you to health; if you are not restored I will get you a boy."

This is at best a very slender basis on which to rest an authority in the wife which the husband did not take the trouble to put into writing. Ram Buksh's remark, elicited in cross-examination, suggests what the three other witnesses suggest, that, if Shib's illness continued, his father was to bring him a boy for adoption. But the witnesses are not very well agreed together. Sadasuk says that Rurmal was present, and Rurmal says that there was only one occasion on which he heard adoption talked about. These two then must be speaking of the same occasion; and Rurmal says nothing about permission. Bridhi also is said to have been present. He tells us that after Shib Narain spoke, nobody said anything on the point of adoption; only Ram Buksh spoke, and what he said was that, as Shib had not recovered in Calcutta, he would take him to Goari.

Chota Lal is said to have been present too. He speaks to several conversations in the family about adoption; and it is not easy to identify that one of which Sadasuk speaks. Some of these conversations clearly contemplate [645] a boy being brought to Shib for adoption; and in none of them is any express permission mentioned such as Sadasuk speaks of.

These are small differences, quite consistent with the truthfulness of the witnesses, who, it will be remembered, were speaking of conversations some 12 or 14 years after they took place. But the question is whether, when these persons were present, Shib intended to confer, and did so express himself as to confer a legal authority on his wife; it is of importance to know exactly what he said; and the differences between the narrators are such as to reduce to a very low value the introduction of two or three important words by one of them. Their Lordships do not refer here to the denial of such conversations by Ram Buksh's wife Jodhi and his son Ram Gopal, who are alleged to have been present. The Judges of the High Court attached importance to these denials: but at present the sufficiency of the plaintiff's evidence is under examination.

There remains the important witness Chuni Bibi. She must, unless she has forgotten, know the truth, her evidence is not lacking in precision; and, if believed, it would fully support the plaintiff's case. She gives an account of the conversation at which Sadasuk and the others were present. It is as follows:—

"No children were born of me. I said 'get me a son.' I also told my brother Chota Lal to tell him (my husband) to get me a son. My brother went to Babu Shib Narain and told him, 'you are now ill; have a son brought. Upon this, Shib Narain Babu said, 'If I recover from my illness, then I will go to my native country and bring a boy.' I then began weeping; upon which he said, 'why do you weep? My father, mother, and brother are sitting here: if my father brings you a boy, that will be well; if not, I give you permission to take a son and preserve my family.' All this talk took place in the house of Natu Ramji Ladu. This talk took place in the month of Magh of the year in which he fell ill. At the time of this talk the persons present were, Chota Lall, Sadasuk, Rurmal (my uncle), Bridhi Chand, the son of my maternal uncle Ram Coomar, my father-in-law Ram Buksh, and Latu Ram, Ram Gopal, the brother of my husband, the defendant Jodhi Bibi, my mother-in-law, Ramanund Thakoor, the servants of the house, and other persons. All this talk took place at 11 or 12 o'clock in the day. No one gave any answer when my husband said all this. My father-in-law said 'God may cure you of your illness, otherwise I will get a boy for you.'"

[646] This accords with Sadasuk's account, except that Chuni makes the important addition that she and Chota Lal opened the attack on Shib, and that the permission given by him was the outcome of that attack; whereas Sadasuk deposes that Chuni said nothing, and the three others do not mention any intervention by her.

In her cross-examination she admits that her husband several times put off her importunities. "He used to say 'I shall go home after my recovery and fetch a boy'" or "when I am well I will talk about it." That accords with the answer which she says that Shib made to her brother Chota Lal at the outset of this interview. But she alleges that he gave formal permission on four several occasions. He used these very words: "If my father procures a boy for you, well and good; if not, I authorise you to preserve my family by taking a son in adoption." But his words were not put into writing, and neither Chuni nor any other of the numerous

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people who heard these things ever once suggested that they should be put into writing.

The other incidents to which Chuni deposes need not be detailed. If believed, she proves the plaintiff's case. If she is to be treated as a witness intending to speak truth, but only liable like every one else to error or forgetfulness or the unconscious bias of interest or the tendency to ascribe to a particular time and person things belonging to later times and other persons, all the evidence should be carefully weighed to see whether her story, however improbable on its surface, may not after all be the true result. But, if she has made false statements on important matters of fact, which it is impossible that she should not recollect, her testimony on other matters in favour of herself is attended with great suspicion.

The defendant Ram Gopal in his written statement, filed in 1889, alleges that in the year 1880 litigation took place in Jeypore regarding this adoption between Ram Buksh and Chuni, as the result of which the adoption was declared by the Court of Sikhar to be invalid. The defendants relied on this decision as *res judicata* in bar of the present suit, but the High Court has rightly disallowed that plea. The nature of the Jeypore suit is left too uncertain for any such use to be made of it. But the [647] proceedings are material to show that Ram Buksh disputed the adoption and that Chuni supported it. The way in which she meets the defendants' allegation is to deny the litigation entirely. "Ram Buksh Babu did not bring any suit against me before the Raja of Sikhar. I did not give any evidence at Sikhar." This she said in March 1891.

The defendants then brought evidence to prove the Sikhar proceedings. One Bala Buksh was examined. He is an official in the Sikhar Court. He speaks of the litigation there, and says that in his presence the evidence of Chuni Bibi was taken by the Judge Moonshi Mahomed Meeah, and that, in his presence, the suit was adjudicated and the order passed. He puts in a document, which he swears is a copy of Chuni's deposition, and is in the handwriting of one of the Court amlas. It is endorsed "Copy corresponding with the original," which is in the handwriting and bears the signature of Mohun Lal, the Sherishtadar of the Court. He proved in the same way the deposition of Ram Buksh, whom he knew personally. Ram Buksh alleges that a widow has no power to adopt a son. Chuni does not meet the allegation by alleging authority from her husband, but complains of the interested hostility of her father-in-law, who is Shib's heir.

Bala Buksh's evidence was given in May 1891. Evidence was taken through the months of June and July, and the cause was not heard till the end of November. The plaintiff did not make any attempt to introduce rebutting or explanatory evidence. He has now nothing to say in answer, except to suggest that the woman, who was called Chuni Bibi, in the Sikhar Court, was somebody who personated the real Chuni Bibi, the widow. It is impossible to listen to such a suggestion of audacious fraud, unsupported by a shadow of proof or even of allegation. Bala Buksh was cross-examined at some length, but no question was asked tending to suggest a trick of the kind which the plaintiff now puts forward. There is nothing to contradict him except Chuni's general denial of all proceedings against her at Sikhar made before he had spoken. The plaintiff does not improve his mother's position ,or his own, by his present suggestion. Their Lordships must look on Chuni's denial as a wilful falsehood and as invalidating her testimony.

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[648] The High Court appear to have excluded all the Sikhar proceedings on the ground that they were not proved according to the mode mentioned in s. 86 of the Evidence Act. That section says that, if a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. It does not exclude other proof. The assertion of Bala Buksh that Ram Buksh sued Chuni, and that she gave evidence before Moonshi Meah in his presence is primary evidence of those matters. His proof of the Sikhar records is secondary evidence; and by ss. 65 and 66 of the Evidence Act secondary evidence may be given of public documents, which these are under s. 74, without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court, which is the case here. Bala Buksh shows that Chuni has told downright falsehoods, and that in a litigation in which her authority to adopt was challenged, she did not assert it. Their Lordships wholly disbelieve the story, at best an improbable one, which she tells of her husband's permission.

The result is to leave the plaintiff's case substantially unsupported. It is probable enough that some conversations took place between Shib Narain and his relatives concerning the adoption of a son by him; but their Lordships agree with the learned Judges below in thinking that the attempt to prove an authority given by him to his wife has failed. They will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant.—Mr. *W. W. Box.*
Solicitors for the respondents.—Messrs. *T. L. Wilson & Co.*

C. B.

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27 C. 649=4 C.W.N. 337.

[649] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I E., Chief Justice, Mr. Justice Macpherson, and Mr. Justice Hill.

RAJNARAIN BHADURI AND ANOTHER (*Plaintiffs*) *v.* S. M. KATYAYANI DABEE (*Defendant*).* [24th and 25th January, 1900.]

Hindu Law—Will—Construction of will—Dayabhaga family—Disposition to widow as malikatwa.

K, a Hindu, died without issue leaving him surviving a widow *B*, having made a will in the following terms:—" I, having by reason of ill-health come to the house of my father in-law *N*, and not having recovered under various modes of medical treatment, (and hence) considering my life in peril I appoint" (literally "make") " my wife *B*, to the *malikatwa* (ownership) after my demise as exercised" (literally "done") " by myself in respect of the family dwelling-house (describing it) and wearing apparel, utensils, &c., whatever there is (*i.e.*) in respect of all the properties aforesaid, I of my own free will make this will."

Held, that *B* took an absolute heritable and alienable interest.

[F., 29 A. 217 (221)=4 A.L.J. 68=27 A.W.N. 19; 5 C.W.N. 300 (304); R., 28 C. 517 (529)=5 C.W.N. 640; 2 Bom. L.R. 888; 5 Bom. L.R. 334 (339); 8 Bom.L.R. 482 (486); 8 C.L.J. 369 (404); 17 C.L.J. 630 (633)=16 Ind. Cas. 809; 14 C.W. N. 458 (461)=5 Ind. Cas. 73; 11 Ind. Cas. 946=61 P.R. 1911=147 P.W.R. 1911; 9 O.C. 119 (122); 1 S.L.R. 211 (215); D., 30 C. 20 (32).]

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* Appeal from Original Civil No. 28 of 1899, in suit No. 207 of 1898, reported at p. 44.

1900
JAN. 25.
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APPEAL FROM ORIGINAL CIVIL.
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27 C. 649 = 4 C.W.N. 337.

THIS was an appeal from a judgment of Mr. Justice Stanley, dated 7th September 1899 (1). The facts of the case as found in the Court below are as follows:—

One Kristo Lall Bhadury died leaving an only widow Bhubunessari Dabee, but no issue surviving. He made a will in Bengali, dated 2nd June 1862, of which the following is a translation:—

"To the blessed Srimati Bhubunessari Dabee,—

This instrument of willnamah (will) is executed by Sri Krishna Lall Bhadury to the following effect: "I having by reason of ill-health come to the house of my father-in-law Srijut Nilmoney Chuckerbati Mahashaye, at Mouzah Novogram in the district of Hooghli, and not having recovered under various modes of medical treatment (and hence), considering my life in peril, I appoint" (literally "make") "my wife Srimati Bhubunessari Dabee to the *malikatwa* (ownership) after my demise as exercised" (literally "done") "by myself in respect of the [650] family dwelling-house (consisting of) two *cottahs* and six *chittaks* of land with building purchased in the name of my father Nilmoney Bhadury Mahashaye, deceased, at Sutanutygram in the town of Calcutta, and wearing apparel, utensils, &c., whatever there is (*i.e.*) in respect of all the properties aforesaid, I of my own free will make (this) will. Finis 1269 date 20th Joisto.

Sree Krishna Lall Bhadury,
of Sutanuty."

Witnesses:
Sree Raj Krishna Biswas
Sree Bhutnath Sastree, &c.

After the testator's death his widow Bhubunessari took possession of his property and remained in possession of it till her death on the 17th January 1898. She died intestate leaving Ashutosh Chuckerbati her sole heir. On the 28th October 1899, Ashutosh Chuckerbati died intestate and without issue leaving him surviving the defendant, Sreemati Katyani Dabee, his sole widow and legal representative. The plaintiffs were grandsons of Roodnarain Bhadury, who was brother of Joynarain Bhadury, the grandfather of the testator Kristo Lall Bhadury, and as such were the reversionary heirs of Kristo Lall Bhadury. They contended that under the will Bhubanessari Dabee took only the ordinary estate of a Hindu widow in his immoveable property and that upon her death they became entitled to this property as reversionary heirs.

JAN. 24. Sir *Griffith Evans* and Mr. *Chakravarti*, for appellants.

Mr. *Hill* and Mr. *M. Dutt*, for respondent.

JUDGMENT.

JAN. 25. MACLEAN, C. J.—The question which we have to decide in this case is dependent upon the construction of the will of one Kristo Lall Bhadury who died many years ago leaving a widow surviving him and no issue.

His will which was made in Bengali is dated the 2nd of June 1862, and is in the following terms:—"I, having by reason of ill-health come to the house of my father-in-law" (naming him) "and not having recovered under various modes of medical treatment and hence, considering my life to be in peril, I appoint" (literally "make") "my wife, Sreemutty Bhubunessari Dabee, to [651] the *malikatwa* (ownership) after my demise as exercised" (literally "done") "by myself, in respect

(1) 27 C. 44.

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of the family dwelling-house," (describing it) "and wearing apparel, etc., whatever there is, (*i.e.*) in respect of all the properties aforesaid, I, of my own free will, make (this) will."

The question is whether the heirs of the deceased testator, who are plaintiffs, or the heirs of the widow, who died in January, 1898, who are the defendants, are entitled to this property, and this depends upon the question what was the estate which the widow took, whether she took an absolute interest, or only the interest of a childless Hindu widow. The learned Judge in the Court below has dismissed the suit, hence the present appeal by the heirs of the deceased testator.

It is urged for the appellants that, although the words of the will, having regard to the true import of the word *malikatwa*, might have conferred upon the widow an absolute interest, had the property been given to her under the will of a stranger,—I should say that the question only arises as to the immoveable property,—that when the gift is by a husband to his wife the same considerations do not apply, and that she does not, and cannot, take an absolute interest upon the ground that there is a distinct and binding rule of Hindu law that, unless upon the language of the will, although the word " malik " or *malikatwa* may be used, an express or implied power of alienation can be taken as given to the widow, she only takes the limited interest of a childless Hindu widow.

For this proposition the appellants rely upon the case of *Bhoba Tarini Debya* v. *Peari Lall Sanyal* (1) which followed the decision in the case of *Koonj Behari Dhur* v. *Prem Chand Dutt* (2).

I ought to state that, admittedly, the case is not affected by the Hindu Wills Act, or by s. 82 of the Succession Act.

In the case of *Bhoba Tarini Debya* v. *Peari Lall Sanyal* (1) the law at p. 649 of the report is laid down as follows:—" If this stood alone,"—'this' referring to the words in the [652] particular will which the Judges were then construing,—"and s. 82 of the Succession Act was not applicable to the case, then as the bequest (which in this respect follows the same rule as a gift) was one of immoveable property by the husband to his wives, they would take a limited estate under the *Dayabhaga*. They would take the property without having any power to alienate it; and property over which they have not the power of alienation, cannot constitute their *stridhana* or absolute property (see *Dayabhaga*, chap. IV, ss. 1, 18, 19, and 23), and must on their death pass to the heirs of her husband (*see* Colebrooke's Digest, Book V., p. 515, commentary :)"—and, later on at p. 651, the same view is further expressed in the following passage :—"We only wish to observe, with regard to those cases, that an important distinction, which is sometimes lost sight of, may reconcile the apparent conflict in some of them. The rule of Hindu law, referred to above, is based upon a text attributed to Narada cited in the *Dayabhaga*, chap. IV, s. 1, 23, and is limited to the case of gift of immoveable property to the wife, and it is to this particular case that the decision in *Koonj Behari Dhur* v. *Prem Chand Dutt* (2) relates."

Taking then the law to be that as stated in the cases I have mentioned, we have to ascertain whether upon the construction of the will, in this case, and accepting as a guide to that question of construction, the law as laid down by the Privy Council in the cases of *Srimati Soorjeemoney Dasi* v. *Denobundo Mullick and others* (3) and *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (4) an express or implied power of alienation can be

(1) 24 C. 646. (2) 5 C. 684. (3) 6 M.I.A. 526. (4) 2 I.A. 7.

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regarded as given to the widow. If the gift had stopped at the words, "after my demise," there would be considerable force in the argument of Sir Griffith Evans, that an absolute interest was not conferred, but we must give some effect to the words that follow "as exercised by myself," ownership as exercised by myself! What do these words mean? What was the nature [653] of his ownership? It was an absolute ownership, and as incident to it, there was an absolute power of alienation; and he confers upon his wife the same class of ownership, that is, an ownership with power of alienation. In this view, which I take to be the true one, she takes an absolute interest, an interest which upon her death devolved upon her heirs and not upon the heirs of her late husband.

We have been much pressed with a decision of the Bombay High Court, in the case of *Hari Lal Pran Lal* v. *Bai Rewa* (1), where the language used was somewhat similar to that in the present case. There the Court held that the widow only took a limited and not an absolute interest. Whilst entertaining the greatest respect for the decisions of that tribunal they are not binding upon us, and moreover the language of that will is, in many respects, different from that in the present case. The whole of that will is not set out in the report, and though no doubt these are the words "Just as I am the owner of the property at present, in the same way my wife, Ujum, is the owner," those words were regarded by the Court as qualified by other provisions in the will, provisions which we do not find in the will now before us. But even in that case the learned Judges expressed doubt as to the conclusion at which they arrived. I am unable to regard that case as governing the present; the two wills are very different in their language and provisions.

Having regard to the circumstances of the testator in this case—at the date of his will he had no children and no near relatives—it is not improbable that he should wish to give his wife an absolute interest in the property, and in my opinion the language of his will has done so.

The view taken by the Court below is right and the appeal must be dismissed with costs.

MACPHERSON, J.—I am of the same opinion.

HILL, J.—I am also of the same opinion.

Appellants' attorneys: Messrs. *M. C. Dutt and Son.*

Respondent's attorney: Babu *Prya Nath Sen.*

F. K. D. *Appeal dismissed.*

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27 C. 654.

[654] CRIMINAL APPEAL.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

QUEEN-EMPRESS *v.* SONAI MUGH (*Appellant*).* [30th March, 1900.]

Chittagong Hill Tracts, Conviction of offences committed within—Appeal from—Jurisdiction of High Court to hear such appeal—Chittagong Act (XXII of 1860*), s.* 1—*Penal Code (Act XLV of* 1860), ss. 379 *and* 457.

There is no jurisdiction in the High Court to hear appeals in respect of sentences passed on conviction of offences committed within the districts known as the Chittagong Hill Tracts.

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* Criminal Appeal No. 376 of 1899, against the order passed by F. R. S. Collier, Commissioner of Chittagong, dated the 17th of November 1899.

(1) 21 B. 376.

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IN this case the accused, who was an inhabitant of Banarban, zillah Chittagong Hill Tracts, was convicted and sentenced by the Commissioner of Chittagong on the 17th of November 1899 under ss. 457 and 379 of the Penal Code.

Against this conviction and sentence the accused preferred an appeal from jail.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was as follows :—

JUDGMENT.

By Act XXII of 1860, s. 1, the tracts of country described in the schedule to that Act and known as the Chittagong Hill Tracts were removed from the jurisdiction of the existing Civil and Criminal Court. Consequently the Court of Sudder Dewany Adawalut had no jurisdiction to hear appeals in respect of sentences passed on conviction of offences committed within those districts. Jurisdiction has not since that date been given either to the Sudder Court or to the High Court. There is, therefore, no jurisdiction in the High Court to hear this appeal. It is accordingly rejected.

D. S. *Appeal rejected.*

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27 C. 655.

[655] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

KHAN BAPUTI DEWAN AND OTHERS (*Petitioners*) v. BISPATI PUNDIT (*Opposite party*).* [9th February, 1900.]

Cow, Slaughter of—Open verandah—Annoyance to residents of locality—Open place, Meaning of—Residents or passengers—General Police Act (V of 1861), s. 34—Act for the Regulation of Police (VIII of 1895) s. 13, being an Act to amend Act V of 1861.

The slaughtering of a cow in an open verandah, so as to cause annoyance to the residents of the locality, and in spite of their remonstrances is a breach of the law, being an act in an "open place" within the terms of s. 34 of Act V of 1861 as amended by Act VIII of 1895.

The words "open place" coupled with "road, street or thoroughfare" should not be interpreted *ejusdem generis*. It seems rather that the addition of these words was intended to have a wider significance, and this is shewn by another amendment in the same section made at the same time in which the annoyance, etc., caused must be not to the residents *and* passengers, but to residents *or* passengers. The intention of the Legislature was to extend the Act not only to passengers who would be on such a road, street, or thoroughfare, but to residents, who are not passengers.

IN this case it appeared that at 4 P.M., on the 17th May 1899, the accused slaughtered a cow in an open verandah, so as to cause annoyance to the residents of the locality and in spite of their remonstrances. The accused were tried and convicted by the Deputy Commissioner of Shibsagar on the 27th of June 1899, under s. 34 of Act V of 1861, of slaughtering the cow in an open place and fined Rs. 50 each, in default, eight days' rigorous imprisonment.

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* Criminal Revision, No. 863 of 1899, made against the order passed by H. C. Barnes, Esq., Officiating Deputy Commissioner of Shibsagar, dated 27th June 1899.

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27 C. 655.

Moulvie *Syed Shamsul Huda*, for the petitioners.

JUDGMENT.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

PRINSEP, J.—The order in this case convicting the petitioners [656] has been passed under s. 34 of Act V of 1861, as modified by Act VIII of 1895. It has been found that the petitioners have slaughtered a cow in an open verandah, so as to cause annoyance to the residents of that locality and in spite of their remonstrances. The learned pleader, who appears for the petitioners, contends that the slaughtering in this open verandah does not constitute a breach of the law, not being an act "in an open place" within the terms of s. 34 as amended, and he contends that the words "open place" coupled with "road" "street," or "thoroughfare," must be interpreted *ejusdem generis*. We are not prepared to construe the law in this limited sense. It seems to us rather that the addition of these words was intended to have a wider significance, and this seems to be shewn by another amendment in the same section made at the same time, in which the annoyance, etc., caused must be not to the "residents *and* passengers," but to "residents *or* passengers." We understand from this that the intention of the Legislature was to extend the Act not only to passengers, who would be on such a road, street or thoroughfare, but to residents, who are not passengers. This rule is, therefore, discharged.

D. S. *Rule discharged.*

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27 C. 656.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

NAKHI LAL JHA (*Petitioner*) *v.* QUEEN-EMPRESS (*Opposite party*).*
[1st February, 1900.]

Security for good behaviour—Imprisonment in default of security—Reference to Sessions Judge—Accused—Notice—Right to be heard by pleader—Order of confirmation—Grounds for such order—Code of Criminal Procedure (Act V of 1898), *ss.* 110, 123 *and* 340.

Where a reference is made to the Sessions Judge under s. 123 of the Code of Criminal Procedure, he is bound to give notice to the person concerned and also to hear his pleader, if he should be so represented. The term "accused" in s. 340 of the Code of Criminal Procedure applies to a person, who is liable under s. 123 of that Code to imprisonment in default of giving security.

[657] The Sessions Judge, in confirming the order of a Magistrate under s. 123 of the Code of Criminal Procedure in regard to the imprisonment of a person in consequence of his being unable to furnish the necessary security, is bound to find a special ground, on which the order is passed, having special reference to s. 110 of that Code. It is not sufficient where he only finds in general terms that it is for the interests of the community at large that such person should be bound over to be of good behaviour.

[Diss., 6 O.C. 262 (265); F., 25 A. 375 (377)=23 A.W.N. 79.]

ON the 31st May 1899 the petitioner in this case was ordered by the Sub-Divisional Magistrate of Kishengunj to execute a bond for Rs. 500

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* Criminal Revision No. 865 of 1899, made against the order passed by F. MacBlaine, Esq., Officiating Sessions Judge of Purneah, dated the 15th of August 1899.

with one surety for the like amount for the maintenance of his good behaviour for three years, under s. 110 of the Code of Criminal Procedure; in default to suffer rigorous imprisonment for that period. The petitioner not being able to furnish security, the matter was referred to the Sessions Judge of Purneah under s. 123 of that Code.

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The Sessions Judge being of opinion that it was not necessary to give the petitioner notice, and that the petitioner was not entitled as of right to appear by pleader, upon the examination of the record alone passed the following order under s. 123 of the Code of Criminal Procedure. "I find no reason to dissent from the Deputy Magistrate's decision, that it is for the interests of the community at large that the defendant should be bound over to be of good behaviour."

Mr. *Abdur Rahim* (with him Babu *Pramatha Nath Sen*), for the petitioner.

JUDGMENT.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

PRINSEP, J.—The rule must be made absolute on both the grounds stated.

This is a reference to the Sessions Judge under s. 123 of the Code of Criminal Procedure, the person bound over to give security for good behaviour not being able to furnish security, and being in consequence liable to imprisonment, under the Magistrate's order, for the term of three years, subject to confirmation by the Sessions Judge. We have no doubt that, on hearing such a reference, the Sessions Judge is bound to give notice to the person concerned and also to hear him by [658] pleader, if he should be so represented. The Sessions Judge in his judgment seems to think that this was unnecessary, and that it was only, if he thought that there were good grounds for requiring a pleader to appear before him, that he was bound to allow such appearance. Section 340 of the Code of Criminal Procedure declares that every person accused before a Criminal Court may of right be defended by a pleader, and the term "accused" in that section has been held to apply to a person situated as the petitioner in the matter before us. In the next place, the Sessions Judge, in confirming the order of the Magistrate in regard to the imprisonment of the petitioner in consequence of his being unable to furnish the necessary security, was bound to find a special ground, on which the order is passed, having special reference to s. 110. He has only found in general terms that it is for the interests of the community at large that the defendant should be bound over to be of good behaviour. That is not a sufficient finding. The order of the Sessions Judge must, therefore, be set aside, and he is directed to hear the reference in accordance with law.

D. S. *Reference remanded.*

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REVISION.

27 C. 658.

27 C. 658.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

HAR KISHORE DASS AND OTHERS (*Petitioners*) *v.* JUGUL CHUNDER KABYARATHNA BHUTTACHARJEE (*Opposite party*).*
[7th February, 1900.]

Conviction of accused—Further inquiry—Offence not charged—Other persons not before Magistrate—Code of Criminal Procedure (Act V of 1898) *ss.* 203, 204 *and* 437—*Penal Code, ss.* 144 *and* 426.

On a complaint made to the Deputy Magistrate he convicted one of the accused *H.*, of mischief. On application made to the Sessions Judge he directed a further inquiry to be made by the Magistrate into another offence, under s. 144 of the Penal Code, in respect of *H.*, no charge of any such offence having been made at any time against him. The Sessions Judge also directed a further inquiry against other persons, who apparently were mentioned in the complaint, but who had not been summoned to appear before the Magistrate.

Held, that the order of the Sessions Judge was without jurisdiction, not being within the powers described by s. 437 of the Code of Criminal Procedure.

[659] IN this case it appeared that on a complaint made to the Deputy Magistrate of Tippera, he, on the 15th of August 1899, convicted *H*, one of the accused, of mischief under s. 426 of the Penal Code and sentenced him to pay a fine of Rs. 30, and in default to undergo rigorous imprisonment for fifteen days. On application being made to the Sessions Judge of Tippera, he, on the 5th October 1899, directed the District Magistrate to cause further inquiry to be made into the complaint under s. 144 of the Penal Code against *H.*, no charge of any such offence having been made at any time against him, and under ss. 144 and 426 of the Penal Code against certain other persons who apparently were mentioned in the complaint, but who had not been summoned to appear before the Magistrate.

The judgment of the Sessions Judge was as follows :—

I am of opinion that the Deputy Magistrate has dealt with the case rather too lightly. He believes the complainant's case to be true, but he has convicted only the accused No. 1 under s. 426 of the Penal Code, and gives no reason why he should not be tried for the offence of being a member of an unlawful assembly. At dead of night, the accused came with a number of lathials armed with deadly weapons and forcibly broke down a hut erected by the complainant some time before without any objection. The Deputy Magistrate has refused to take any action against the accomplices of the accused No. 1, though it is clear upon the evidence that they were as much responsible as the accused No. 1 for the unlawful assembly and mischief. I therefore direct that the District Magistrate do cause further enquiry to be made by himself or by some Magistrate subordinate to him into the complaint under s. 144, Penal Code, against Har Kishore Das, and under s. 144 and s. 426 Penal Code against Kamini Kishore Das, Sobed Ali and Mothoor Singh.

Babu *Gobind Chunder Das*, for the petitioners.

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* Criminal Revision No. 832 of 1899, made against the order passed by D. N. Mitter, Esquire, Officiating Sessions Judge of Tipperah, dated the 5th of October 1899.

JUDGMENT.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by—

PRINSEP, J.—On a complaint made to the Magistrate he convicted one of the petitioners, Har Kishore Dass, of mischief and sentenced him to fine. On application made to the Sessions Judge he directed a further inquiry to be made by the Magistrate into another offence, *viz.*, under s. 144 of the Penal Code in respect of Har Kishore Dass, no charge of any such offence having been made at any time against him. The Sessions Judge has also directed a further inquiry against other persons who [660] apparently were mentioned in the complaint, but who had not been summoned to appear before the Magistrate.

In our opinion the order of the Sessions Judge is without jurisdiction not being within the power described by s. 437. The complaint had not been dismissed under s. 203 or sub-s. (3), of s. 204 of the Code of Criminal Procedure, inasmuch as on that complaint Har Kishore Dass had been convicted, nor was this a case in which any accused person had been discharged, because Har Kishore Dass had never been tried for any offence except that of mischief, and in regard to the other petitioners, they had never been before the Court at all. It may be that proceedings can be taken against all these persons. That, however, is a matter for the discretion of the Magistrate, but it is not one, on which the Sessions Judge can under s. 437 of the Code of Criminal Procedure direct the Magistrate to proceed. The order for further inquiry is accordingly set aside and the rule is made absolute.

D. S. *Rule made absolute.*

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27 C. 660.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

JATU SING AND OTHERS (*Petitioners*) v. MAHABIR SINGH (*Opposite-party*).* [30th January, 1900.]

Theft, Charge of—Conviction—Appeal—Acquittal of theft—Conviction of offence of different character, legality of—Code of Criminal Procedure (Act V of 1898), *s.* 423—*Penal Code (Act XLV of* 1860), *ss.* 143 *and* 379.

The accused were convicted of theft: that was the only charge which they were called upon to answer. In appeal the District Magistrate held that no theft had been committed, but he convicted accused of being members of an unlawful assembly. *Held*, that on the trial the accused were called upon to answer only a charge of theft, they were never called upon to answer any other charge, and they therefore could not fairly be convicted on their appeal of an offence of an entirely different character.

It is on the proceedings taken before the Magistrate that the facts constituting an offence for which a trial is held, are made known to the accused and the law is applied by the Magistrate to the facts established, so as to constitute the charge which the accused is called upon to answer.

[661] It therefore cannot be said that sufficient notice was given to the accused because mention of s. 147 of the Penal Code (rioting) together with theft

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* Criminal Revision No. 837 of 1890, made against the order passed by H. L. Mesurier, Esq., District Magistrate of Patna, dated the 17th of July 1899.

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27 C. 660.

was made in the final report of the police, as the offences considered to have been established, and that the accused must have been made acquainted with such report.

[F., 3 L.B.R. 232 (233); R., 11 Cr. L.J. 340=5 Ind. Cas. 974=7 M.L.T. 202.]

IN this case the Sub-Deputy Magistrate of Barh convicted the accused on the 27th June 1899 of theft: that was the only charge which they were called upon to answer. The accused appealed to the District Magistrate of Patna, who, on the 17th July 1899, held that no theft had been committed by the accused, but he at the same time convicted them of being members of an unlawful assembly under s. 143 of the Penal Code.

Mr. *K. N. Sen Gupta*, for the petitioners.

JUDGMENT.

The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by—

PRINSEP, J.—In this case the Magistrate convicted the petitioners of theft, and that was the only charge which they were called upon to answer.

In appeal the District Magistrate has held that no theft was committed, but, at the same time, he has convicted the accused of being members of an unlawful assembly. That, however, was an offence of which they had never been accused, and regarding which they had not been called upon to enter on their defence, and it was, moreover, an offence of an entirely different character from that of theft, for which they had been tried.

In his explanation, the Joint Magistrate, who is in charge of the office of District Magistrate, has stated that sufficient notice was given to the accused because mention of s. 147 of the Penal Code (rioting) together with theft was made in the final report of the police, as the offences considered to have been established, and that the accused must have been made acquainted with such report. We do not see how this applies to the present case. It is on the proceedings taken before the Magistrate that the facts constituting an offence for which a trial is held are made known to the accused, and the law is applied by the Magistrate to the facts established so as to constitute the charge which the [662] accused is called upon to answer. Here, on the trial, the accused were called upon to answer only a charge of theft. They were never called upon to answer any other charge, and they therefore could not fairly be convicted on their appeal of an offence of an entirely different character. The conviction and sentence will therefore be set aside, and the fines, if paid, refunded.

D. S.

27 C. 662.

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Before Mr. Justice Prinsep and Mr. Justice Stanley.

QUEEN-EMPRESS *v.* IMAN MONDAL (*Petitioner*).*
[25th January, 1900.]

Proceedings for taking security for good behaviour—Discharge of person called upon—Further inquiry, Power to order, in such proceedings—Code of Criminal Procedure (Act V of 1898), *ss.* 110 *and* 437.

A further inquiry cannot be made into the case of a person against whom proceedings under s. 110 of the Code of Criminal Procedure have been taken, and who has been discharged. If it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law, on fresh information received.

The further inquiry which can be ordered under s. 437 of the Code of Criminal Procedure is into a complaint which has been dismissed or into the case of any accused person who has been discharged.

Proceedings under s. 110 of the Code of Criminal Procedure cannot be regarded as on a complaint, nor can they be regarded as a case in which any accused person has been discharged, for the terms "accused person" and "discharge" in s. 437 of the Code of Criminal Procedure, clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of chap. XIX of the Code.

[**Diss.**, 24 A. 148 (150)=21 A.W.N. 206; 2 L.B.R. 80 (83); 24 P.R. 1903 Cr=20 P.L.R. 1904; **N. F.**, 35 B. 401 (403)=1 Bom. Cr. C. 49=13 Bom. L.R. 505=12 Cr. L.J. 430=11 Ind. Cas 614; **F.**, 20 A.W.N. 206; 42 P.R. 1905 Cr=131 P.L.R. 1905; **R.**, 17 C.P.L.R. 127 (129); 36 M. 315=14 Cr. L.J. 559=21 Ind. Cas. 159; 6 O.C. 262 (267); 36 A. 147 (152)=12 A.L.J. 167=15 Cr. L.J. 39=22 Ind Cas. 183; 15 Cr. L.J. 531=24 Ind Cas. 843=U.B.R. 1914, 1st. Qr., p. 3.]

IN this case proceedings under s. 110 of the Code of Criminal Procedure were instituted against the petitioner, who was tried and released by the Deputy Magistrate of Bogra on the 5th September 1899. A further inquiry was made into the matter under s. 437 of the Code by the District Magistrate of Bogra, who, on the 30th September 1899, ordered the petitioner under s. 118 of the Code to execute a bond for Rs. 200 with two sureties for Rs. 200 each for his good behaviour for one year.

Babu *Sarat Chunder Roy Chowdhry*, for the petitioner.

JUDGMENT.

[663] The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by—

PRINSEP, J.—The order for further inquiry in this case purports to have been made under s. 437 of the Code of Criminal Procedure, and it relates to proceedings taken under s. 110, requiring the petitioner to give security for good behaviour. Section 437, which is the only law authorizing a Magistrate to reopen proceedings in which a person has been discharged or "released," does not relate to a case of this description. The further inquiry which can be ordered under s. 437 is into a complaint which has been dismissed or into the case of any accused person who has been discharged. A reference to the definition of complaint will show that it relates only to the commission of an offence, and an offence means any act or omission made punishable by any law for the time being in force; so that

* Criminal Revision No. 809 of 1899, made against the order passed by B. C. Sen Esq., District Magistrate of Bogra, dated the 5th of September 1899.

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proceedings under s. 110 of the Code of Criminal Procedure cannot be regarded as on a complaint. Nor can they be regarded as a case in which any accused person has been discharged, for the terms "accused person" and "discharge" in s. 437 clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of chap. XIX of the Code of Criminal Procedure. The order must therefore be set aside. If it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law on fresh information received.

D. S.

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27 C. 663.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Harington.

BHEKDHARI LAL AND OTHERS (*Defendants*) *v.* BADHSINGH DUDHARIA AND OTHERS (*Plaintiffs*).* [4th May, 1900.]

Landlord and Tenant—Lease—Suit for account—Principal and Agent, relationship of—Set-off—Rent set off against advances—Suit for rent—Limitation Act (XV of 1877), *arts.* 85, 89, *sch.* II.

[664] The plaintiffs executed a lease for nine years in favour of the defendant No. 1 at a fixed annual rent payable by instalments. The defendant under instructions from the plaintiffs paid from time to time Government revenue, cesses, expenses of litigation, &c., on their behalf, and used to set off those sums against the rent due to them under the lease; no sum of money by way of advance or otherwise from the plaintiffs ever came into the hands of the defendant. After the expiry of the lease the plaintiffs instituted this suit against the defendant for an account:

Held, that the suit for an account was not maintainable; the relationship between the parties as created by the lease was simply that of landlord and tenant, and the only relief which the plaintiffs could have properly asked for was a decree for rent, if any was still due.

ON the 25th of September 1885 the plaintiffs executed a lease for nine years in favour of the defendant No. 1 as the head of a joint Mitakshara family, at an annual rent of Rs. 1,400, payable by fixed instalments, and they received Rs. 700 from the defendant by way of security for due performance of the contract. The defendant, under the direction of the plaintiffs, paid from time to time Government revenue, public cesses, cost of *gilandazi* or embankments, expenses of litigation &c., on behalf of the plaintiffs, and used to set off those amounts against the rent due to them under the lease; and the defendant never received any money from the plaintiffs by way of advance or otherwise.

The term of the lease expired on the 30th of Bhadra 1301 F. S. (15th of September 1894).

ON the 29th of July 1897 the plaintiffs instituted this suit for an account in respect of the leased property alleging that there was a relationship of principal and agent between the parties, and prayed for a decree for Rs. 1,364-7-9 with interest and costs, the defendants failing to render such an account.

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* Appeal from Order No. 113 of 1899, against the order of J. Knox-Wight, Esq., District Judge of Patna, dated the 23rd of December 1898, reversing the decree of Babu Upendra Chunder Mullick, Subordinate Judge of that District, dated the 17th of August 1898.

The defendant pleaded that the relationship between the parties being only that of landlord and tenant, the suit for an account would not lie; that the payments of Government revenue, &c., were made with the permission of the plaintiffs; that no relationship of principal and agent ever existed between them; and that the suit was barred by limitation under the Bengal Tenancy Act.

The Court of first instance dismissed the plaintiffs' claim, holding that the suit for an account was not maintainable, and it being really a suit for rent was barred by limitation.

[665] The District Judge, on appeal, set aside the order of the first Court. He held, relying upon the case of *Narsingh Narain Singh* v. *Lukputty Singh* (1), that the plaintiffs were equitably entitled to a rendition of account, as the relationship of principal and agent was established between the parties, there having been "a sort of running account" between them; and he accordingly remanded the case to the original Court to be tried on its merits.

Against this order of remand the defendants appealed to the High Court.

Babu *Karuna Sindhu Mukerjee* and Babu *Surendra Nath Ghosal*, for the appellants. This being really a suit for rent, it is barred by limitation. The plaintiffs have purposely framed the suit as one for an account, and not for rent, in order to save the limitation. The case of *Narsingh Narain Singh* v. *Lukputty Singh* (1) relied upon by the lower Court, is distinguishable from the present one. That case involved the question of a mortgage, and the suit was for possession of the demised property and for an account.

The art. 89, sch. II of the Limitation Act, contemplates reciprocal obligations or duties, and is therefore not applicable to the present case where the transactions were only onesided. This being clearly a suit for arrears of rent is barred under the provisions of the Bengal Tenancy Act.

Babu *Promotho Nath Sen* (with him Babu *Saroda Charan Mitter*), for the respondents.—This suit was within time under art. 89, sch. II of the Limitation Act. If the defendant held my money in his hands, he was liable to render me an account. He was not a mere tenant but he also acted as my agent, and is accountable to me for paying Government revenues, cesses, &c., on my behalf. [GHOSE, J.—Is there any statement in your plaint showing that the defendant occupied the position of an agent?] I don't find any such statement in the plaint. In the case of *Narsingh Narain Singh* v. *Lukputty Singh* (1), there was a prayer for an account, and therefore it was rightly relied upon by the [666] District Judge. And the finding of the lower Court being that there was a current account between the parties, art. 85, sch. II of the Limitation Act may also apply to this case.

Babu *Saroda Charan Mitter* following.—The only question is whether a suit for an account is maintainable. It appears that there was a subsequent arrangement between the parties that the defendant should pay Government revenue, cesses, &c., on behalf of the plantiffs, as admitted in his written statement, and as a matter of fact the defendant did make such payments from time to time. It is a case of an ordinary bailee having my money in his hands. Upon these admitted facts the suit for an account would lie, and this appeal should be dismissed.

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(1) 5 C. 333.

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JUDGMENT.

The judgment of the Court (GHOSE and HARINGTON, JJ.) was delivered by—

GHOSE, J.—This is an appeal against a judgment of the District Judge of Patna, by which a suit instituted by the plaintiffs was remanded to the Court of first instance for the purpose of an account being taken from the defendant.

The facts out of which the suit arose are shortly these. The plaintiffs executed a ticca lease for nine years, commencing from the year 1293, and ending in the year 1301 F. S., upon an annual rent of Rs. 1,400, Rs. 700 being deposited by the defendant, the lessee, by way of security in the hands of the lessors, with this stipulation, that the amount should be applied towards the rent of the last year of the lease, namely, 1301.

The plaintiff's case, as set out in the plaint, is that, after the expiration of the period for which the ticca was given, they called upon the defendant for an account of the collections of the annual rent and the payments made by him; but the defendant failed to comply with the requisition, and therefore they (the plaintiffs) are entitled to sue for an account in connection with this ticca transaction from Assin 1293 to Bhadra 1301; and they pray that in default of the defendant rendering such account, a decree may be given to them (the plaintiffs) for Rupees 1,364-7-9.

It will be observed, on a reference to paragraphs 6 and 7 of the plaint, that the plaintiffs treat the defendant as servant from the [667] year 1302, and also allege some agency or other in him (the defendant), in regard to the collection of arrears of rent from the *raiyats* antecedent to the execution of the ticca lease in question. But as regards any money due in connection with such agency or agencies the plaintiffs distinctly state they would bring a separate suit for the same.

We should desire here to state that in the schedule annexed to the plaint, showing how the sum of Rs. 1,365-7-9, which the plaintiffs sue for, in default of the defendant rendering an account, is arrived at, we find that the sums on the credit side are only sums made up of the rent due from the defendant under the ticca lease, no other sum of money by way of advance or otherwise on the part of the plaintiffs being set out; and on the other side of the account in the schedule are put down items of expenses by way of Government revenue, road cess, and certain other items, which the defendants paid on plaintiffs' account.

The defendant in answer to this suit pleaded, in the first place, that the suit was barred by limitation, and, in the second place, he contended that a suit for an account was not sustainable against him; and he further stated that, with the permission of the plaintiffs, he (the defendant) used to pay into the Collectorate revenue and road cess, and he also paid the expenses in connection with certain litigation in which the plaintiffs were concerned, and that the said items of expenditure had been set off against the rent payable to the plaintiffs; and he went on to say, with reference to the account filed by the plaintiffs, that the latter had not deducted certain items of expense which he (the defendant) had met on plaintiffs' account, and that the account filed by the plaintiffs was incorrect.

The Court of first instance, with reference to those pleadings, held that no suit for an account could be sustained, and that the only relief which the plaintiffs could have asked for was recovery of rent, which relief was barred by the law of limitation.

This judgment, however, has been set aside by the District Judge on appeal. He seems to find that there was a sort of running account between the parties, and in reference to this particular matter, what he says is as follows: "So far of course the deed showed merely the relationship of landlord and tenant. But [668] the parties by their acts went a good deal beyond this. Defendant No. 1 used to pay Government revenue, and the expenses of litigation and the costs of *gilandazi* or embankments, &c., &c. In this way there was a sort of running account between the plaintiff and the defendant No. 1. That this was clearly understood by the parties is proved by the defendant's own defence." And then he holds that the plaintiffs are entitled to call upon the defendant for an account, and that the suit having been brought within three years from the end of the year 1301, when the *thika pottah* terminated, is not barred by the law of limitation, but that if a suit for rent had been brought, it would certainly have been so barred. In this view of the matter the learned Judge remanded the case to the Court of first instance with a view that the defendant might be called upon to render an account.

In second appeal by the defendant it has been contended that, accepting the facts as found by the District Judge, no suit for account could be maintained against the defendant; and we think this contention is correct. The relationship between the parties, as created by the *thika pottah*, to which we have already referred, was simply that of landlord and tenant; and that being so, the only relief that the plaintiffs *prima facie* were entitled to ask for was a decree for rent. But then, it is said, that by reason of the subsequent conduct of the parties, the relationship, as created by the *thika pottah*, underwent considerable alteration, so as to make the defendant liable to render an account to the plaintiffs in respect of the rent which he (the defendant) had been retaining in his hands (for that is the way in which it is put on behalf of the plaintiffs) and in respect of the disbursement which he (the defendant), as agent of the plaintiffs, had been making on their behalf. Now the facts on which the conclusion arrived at by the District Judge is based, and upon which also the learned vakil for the respondent has placed considerable reliance, are those to which we have already referred, namely, that the defendant used to pay Government revenue and expenses of litigation and cost of *gilandazi*; and the question, which here arises, is, whether, by reason of these circumstances, there was the relationship of principal and agent created between the parties, such that in the event of the defendant not paying the rent due to the plaintiff, as it fell [669] due year after year, they could, after the termination of the *thika* in the year 1301, call upon the defendant for an account. Now referring back for a moment to the written statement of the defendant, this is how he puts his defence, namely, that with the permission of the plaintiffs he (the defendant) had been paying on their account revenue and road cess into the Collectorate, and also litigation expenses; and that these sums of money which he thus paid were set off against the rent payable to the plaintiffs; or, in other words, that by reason of the payments that he made from time to time under the direction of the plaintiffs, the whole of the rent had been discharged. And that is really the footing upon which the defendant has been found by the District Judge to have been acting, and nothing more, namely, that under an arrangement come to between the parties, subsequent to the grant of the *thika*, the defendant had been paying, on account of the plaintiffs, certain sums of money by way of payment of the rent due to the plaintiff. We

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think that the facts that have been found by the District Judge, even if accepted as thoroughly correct, do not entitle the plaintiff to call upon the defendant for an account, and that the only relief which the plaintiffs could have properly asked for was a decree for rent against the defendant, if such rent was still due. If they had brought such a suit the defendant might have pleaded the payments made by him as discharging either wholly or partly the rent due to the plaintiffs; but that is not the present case.

In the view that we have just expressed, we think that the suit for an account is not maintainable. The result is, that this appeal must be allowed, and the suit dismissed with costs in all the Courts.

B. D. B. *Appeal allowed.*

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27 C. 670.

[670] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Stevens.

GANGA DAS SEAL (*Judgment-debtor*) *v.* YAKUB ALI DOBASHI AND ANOTHER (*Decree-holder*).*
[23rd November, 1899 and 2nd March, 1900.]

Appeal—Civil Procedure Code (Act XIV of 1882), *ss.* 2, 232, 244, *cl.* (*c*)—*Civil Procedure Code Amendment Act (VII of* 1888)—*Application by transferee from legal representative of decree-holder—Question relating to execution, discharge, satisfaction or stay of execution of decree—Parties to suit—Legal Representative—Meaning of the terms "transferee" and "representative"—Decree—Administrator of estate.*

Any person who, at the time of the execution of a decree, is a *transferee* within the meaning of s. 232 of the Code of Civil Procedure is a *representative* of the decree-holder within the meaning of s. 244, cl. (*c*), of the Code; and the term *representatives* in that section includes subsequent transferees as well as those who purchased directly from the person who obtained the decree.

An order of a Court executing a decree determining whether an alleged transferee from a decree-holder or from his legal representative is or is not the representative of the decree-holder within the meaning of s. 244, cl. (*c*), of the Code of Civil Procedure, is an order under that section and therefore a decree, and an appeal lies from such order.

Dwar Buksh Sirkar v. *Fatik Jali* (1) and *Badri Narain* v. *Jai Kishen Das* (2) followed.

[R., 12 C.L.J. 312=7 Ind. Cas. 55; 15 C.P.L.R. 69 (71).]

ONE Abdul Rahman obtained a money decree against one Ganga Das Seal in 1896, and on his death, his son, Fazal Rahaman, was appointed sole administrator to his estate. Fazal Rahaman applied for execution of the decree on the 11th June 1898. The judgment-debtor raised several objections, which were heard and rejected on the 6th August, 1898. On the 8th August, 1898, the present applicant, Yakub Ali Dobashi, applied for an order to substitute him in the place of Fazal Rahaman and to allow him to execute the decree. It was alleged that the decree had been transferred to the applicant by Fazal Rahaman [671] by a *kobala*, dated the 5th August 1898. The judgment-debtor objected to the application on

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* Appeal from Appellate Order No. 79 of 1899, against the order of G. Gordon, Esq., District Judge of Chittagong, dated the 23rd of December 1898, reversing the order of Babu Tincowri Chowdhry, Munsif of Chittagong, dated the 10th of September 1898.

(1) 26 C. 250. (2) 16 A. 483.

the grounds : (1) That the alleged transfer of the decree was a fraudulent and *benami* transaction, made with a view to defeat and delay the execution of a decree, which he himself had obtained against the decree-holder, and (2) that the estate of the decree-holder having been vested in a Receiver appointed by Court, Fazal Rahaman was not competent to transfer the decree.

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The Munsif on the evidence held that the alleged transfer of the decree was not *bona fide*, and without entering into the question raised by the second objection dismissed the application for substitution.

An appeal was preferred to the District Judge from the decision of the Munsif. On behalf of the judgment-debtor, respondent, it was contended that no appeal lay. The District Judge overruled this preliminary objection, holding that an appeal did lie to him. On the merits he held that there was no reason to find that the alleged transfer of the decree was a paper transaction and he allowed the application without considering or referring to the second objection raised by the judgment-debtor in the first Court.

The judgment-debtor, Ganga Das Seal, appealed to the High Court. The appeal came on for hearing before MACPHERSON and STEVENS, JJ., on the 23rd November, 1899.

Babu *Jatra Mohan Sen*, for the appellant.

Moulvi *Serajul Islam*, for the respondents.

Cur. adv. vult.

MARCH 2, 1900. The judgment of the High Court (MACPHERSON and STEVENS, JJ.) was as follows :—

JUDGMENT.

Abdul Rahaman, having obtained a decree for money against the appellant, died before the decree was executed. Fazal Rahaman, the administrator of his estate, put the decree in execution and then transferred it by assignment in writing to Yakub Ali Dobashi, who applied to have his name put on the record as decree-holder and to execute the decree. The Munsif on the appellant's objection rejected the application, holding on the evidence adduced by the parties that the alleged transfer was a [672] sham and collusive transaction. Yakub Ali Dobashi appealed, and the District Judge, finding that there was a good transfer for consideration, reversed the Munsif's order and allowed the application.

This appeal is preferred by the judgment-debtor against the order of the District Judge, and his contention is that the Judge acted without jurisdiction in reversing the Munsif's order, as there was no right of appeal against that order.

We think this contention fails. In our opinion the case comes under s. 244 of the Civil Procedure Code and the Munsif's order is a decree according to the definition of that term in s. 2 of the Code. The Allahabad Court held in *Badri Narain* v. *Jai Kishen Das* (1), that a person who purchased a decree from the person in whose favour the decree was made is his representative, within the meaning of clause (*c*), s. 244 and that the order of the execution Court determining whether he is or is not such a representative, if that question arises, is an order under s. 244 and therefore a decree.

This Court came to the same conclusion in *Dwar Buksh Sirkar* v. *Fatik Jali* (2). In the present case the decree was purchased, not from the person who obtained it, but from his legal representative, the person

(1) 16 A. 483. (2) 26 C. 250.

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who was administering his estate. We think the purchaser is *qua* the decree as much the representative of the preson who obtained the decree, as if he had purchased it directly from him.

It is argued that although the term "representatives" in s. 244 may include a purchaser direct from the person who obtained the decree, and who was necessarily a party to the suit, subsequent transferees would not be included in the term. We see no reason for any such distinction. If the term "representatives" in cl. (*c*), s. 244, includes a transferee at all, it includes, we consider, any person who is at the time of execution a transferee within the meaning of s. 232. This was the conclusion arrived at in the Allahabad case cited above, and we adopt without repeating the reasons given in that case. If the [673] transferee of the decree to whom the provisions of s. 232 would apply is not, *qua* the decree, the representative of the person, we originally obtained it, within the meaning of s. 244, the result would be this: that in no case in which a decree had been transferred could any question relating to the execution, discharge or satisfaction of the decree, or to the stay of execution thereof be determined under s. 244 as between the transferee and the judgment-debtor, although the transferee is the decree-holder, as that term is defined in the Code, and the person who is entitled to execute the decree. Obviously, we think, this was not the intention of the Legislature in enacting s. 244 and the addition made thereto by Act VII of 1888.

We hold, therefore, that an appeal did lie to the District Judge. The appellant cannot question in second appeal the Judge's decision that there was in fact a transfer for consideration. It was, however, contended in the first Court that Fazal Rahaman had no power to make the transfer, even if he did make it, as the estate was at the time of the transfer vested in a Receiver appointed under an order of Court. The first Court, holding that there was in fact no transfer, did not go into this question; but the District Judge before reversing the order ought to have determined it.

If the estate was at the time of the transfer vested in a Receiver duly appointed, and the decree appertained to the estate, Fazal Rahaman had apparently no power to transfer the decree. We do not know what the facts on this point are. They must be determined by the Judge. His order must be set aside and the case sent back in order that he may determine them and dispose of the case accordingly. The costs of this appeal will abide the result.

M. N. R. *Case remanded.*

27 C. 674.

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[674] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Harington.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) v. MOHIUDDIN AHMAD (*Plaintiff*).* [25th May, 1900.]

Income-tax Act (*II of* 1886), *ss.* 3, 4, 5—*Religious endowment*—Sajjadanashin—Khankah —*Liability of the* Sasseram Sajjadanashin *to pay Income-tax— Assessment of Income-tax—Exemption from assessment—*"*Salary*"—*Remuneration—Maintenance —Position of* Sajjadanashin *as distinguished from that of* Mutwalli—Wakf— Farrukhsyari *property.*

The *Sajjadanashin* of the Sasseram *Khankah* is not liable to be assessed with income-tax under the provisions of Act II of 1886, in respect of such moneys as he draws from the *Khankah* properties for the purpose of his own maintenance and that of his family.

The position of the *Sajjadanashin* discussed, and distinguished from that of a *Mutwalli*.

Semble. The maintenance of the *Sajjadanashin* of the Sasseram *Khankah* is a part of the purpose for which the *Khankah* was established.

Mohiuddin v. *Sayiduddin* (1), *Piran* v. *Abdool Karim* (2) referred to.

[R., 6 Bom. L.R. 1058 (1063); 6 A.L.J. 632 (634).]

THE plaintiff is the *Sajjadanashin* (Superior) of an old endowment known as Sasseram *Khankah* † founded by Shah Kabir Dervish in the early part of the eighteenth century. In 1717 the Emperor Farrukhsyar, by a *Firman*, granted several villages in Pergunnah Sasseram (known as Farrukhsyari properties) as a free gift in perpetuity, for the purpose of defraying the expenses of the *Khankah*, to Shah Kabir Dervish, to descend to his heirs in succession.

The material portion of the grant was to this effect :—

"In this auspicious time the illustrious *firman* is promulgated. By it one lac of *dams* out of Pergunnah Huvelee Sasseram in Subah Behar, amounting to 1,197 Rupees more or less, are granted as *altumgha*, ‡ * * * to defray the expenses of the *Khankah* of Shah Kabir Dervish. * * *

[675] Let all the Imperial Officers, now and hereafter, leave the above *dams* in his possession for generation after generation and descendant after descendant, and consider them in every respect free of all charges." * * * *

Subsequently various other grants of landed properties were made from time to time for the maintenance of the institution and the support of Shah Kabir's descendants.

The plaintiff, as *Sajjadanashin* for the time being, is in sole possession of the *Khankah* properties the income of which is wholly derived from agricultural lands. Out of this income he appropriates a portion for his own maintenance and that of his family, and the rest is spent in religious matters in connection with the *Khankah*.

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* Appeal from Appellate Decree No. 1372 of 1898, against the decree of F. H. Harding, Esq., District Judge of Shahabad, dated the 13th of April 1898, affirming the decree of Moulvie Ali Ahmed, Munsif of Sasseram, dated the 16th of July, 1897.

† A religious establishment in the nature of a monastery where religious devotees congregate or reside for religious instruction or spiritual communion.—*Ameer Ali.*

‡ A royal grant in perpetuity descending to posterity.

(1) 20 C. 810. (2) 19 C. 203.

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The Collector of Shahabad, under the provisions of Act II of 1886 (an Act for imposing a tax on income derived from sources other than agriculture) assessed an income-tax of Rs. 130-3-4 per annum, on that portion of the income of the *Khankah* which the plaintiff appropriated for his maintenance. The plaintiff took objection to this assessment, but the Collector overruling his objection realized from him the amount of the tax together with fine, costs of recovery, &c. Upon that the plaintiff, questioning the validity of this taxation, instituted this suit praying for a declaration, among other reliefs, that he had been illegally taxed under the aforesaid Act,—he having a beneficial interest in the endowed property the income of which is derived purely from an agricultural source.

The Collector of Shahabad contested the suit, on behalf of the Secretary of State for India in Council, alleging *inter alia*, that the plaintiff was rightly assessed on the income he derived by way of remuneration from the endowment, by virtue of the office he held, for the support of his family, and had not been assessed on the income derived from landed property.

The Court of first instance held that the plaintiff derived his income from an agricultural source, and was therefore not liable to be assesssed under Act II of 1886, and gave judgment for the plaintiff.

The District Judge, on appeal, found that "the Farrukhsyari **[676]** properties were regarded as devoted to religious purposes including the maintenance of the Superior and his family, and that the plaintiff was not liable to be taxed under the Act any more than any other person deriving an income from land used for agricultural purposes," and he accordingly affirmed the judgment and decree of the first Court.

The defendant appealed to the High Court mainly on the following grounds :—

(1) "That both the lower Courts are wrong in holding that the income on which the tax was levied was agricultural and not taxable under Act II of 1886."

(2) "That the *Sajjadanashin* of the *Khankah* is not the owner of the estate in any sense of the word, and that whatever he gets by way of maintenance allowance is not an income derived from agriculture."

Babu *Ram Charan Mitter* (Senior Government Pleader) and Babu *Srish Chunder Chowdhuri* (Junior Government Pleader), for the appellant.—The sole question is whether the plaintiff is exempted from liability to pay income-tax on the allowance received by him as *Mutwalli* of the endowed property. If he were the beneficial owner of the property he might have been exempted. But he is not so. That portion of the income which goes to the pocket of the *Mutwalli* is his salary or allowance, and it must be regarded as his private income not derived from agriculture and therefore assessable. Under s. 3, cl. (4) of the Income-tax Act "salary" includes an allowance ; and "income" is defined by cl. (5) of the same section. [HARINGTON, J.—Has the plaintiff any power to appropriate any fixed sum to his own use ?] That does not appear ; but the practice is for the *Sajjadanashin* to prepare annually a budget showing how much is to be spent for the religious purposes of the *Khankah*, and how much for his own maintenance and that of his family. And, it is true, the plaintiff appropriates the balance of the *Khankah* income to this own use after defraying the expenses of some religious rites and ceremonies. If an allowance be paid to a *Mutwalli*, be it for his maintenance, it would be **[677]** his "salary" within the meaning of s. 3, cl. (4) of the Income-tax

Act; and it being an income derived from a source other than agriculture would be liable to an assessment under the Act.

The owner of a monastery may not be liable to taxation, under the Act, but if an allowance be made by him to another person in consideration of his services, the latter would be liable to the tax. The plaintiff is only a *Mutwalli*, and the real owner of the property is the *Khankah*, which pays him a certain sum of money in consideration of his services. In the case of *Jewan Das Sahoo* v. *Shah Kubeer-ood-deen* (1), which was in reference to this *Khankah*, their Lordships of the Privy Council held that the real owner was the *Khankah*, and the persons named in the grant, were only *Mutwallis* of the *Khankah*. In the case of *Mohiuddin* v. *Sayiduddin* (2), relied upon by the lower Courts, it was not held that a *Mutwalli* had any beneficial interest in the *wakf* property. Regard being had to the nature of the institution, the allowance given to the plaintiff is a purely personal allowance, for which he should be made liable to pay the income-tax, and he should be considered a salary-holder. So long as he is not the owner of the property, but merely a recipient of only a small portion of its income for his maintenance, he is liable to the tax. The plaintiff being only the *Mutwalli*, and his allowance for services rendered being payable from out of the agricultural income of the *Khankah*, he cannot be said to derive his own income from agricultural sources, and he cannot, therefore, claim an exemption from the operation of the Income-tax Act.

Babu *Umakali Mukerjee* (with him Moulvie *Serajul Islam*), for the respondent.—The income that comes to the plaintiff's hands is agricultural produce and rents, and whatever he gets is derived from agricultural lands, and therefore it cannot be taxed under s. 5, cl. (*a*) of Act II of 1886. [HARINGTON, J.—Is not a person receiving a fixed sum for performing religious ceremonies liable to the tax?] Yes, if there be a distinct person under whom he acts as manager or servant; but that is not the case here. According to the *Firman* itself no pay is paid to the plaintiff. He receives the whole of the *Khankah* income, spends a **[678]** portion of it in performing religious ceremonies, and appropriates a portion for his own maintenance and that of his family. He has the uncontrolled possession of the *Khankah* properties and of the income derived therefrom, and therefore he has a beneficial interest in the same. His income may be regarded as a part of the *Khankah* expenses, and consequently like the other expenses of the *Khankah*, is not assessable with the tax. He has no fixed salary or income, and therefore the money he draws for his support is not assessable under sch. II, Part I of Act II of 1886, nor is it liable to be taxed under s. 5, cl. (*e*) of the Act.

The decision in the case of *Mohiuddin* v. *Sayiduddin* (2) is conclusive on the question of the plaintiff's position as *Sajjadanashin*.

Babu *Ram Charan Mitter* in reply.—Section 5, cl. (*e*) of the Income-tax Act has no application whatever to the present case. That clause exempts from taxation all incomes, agricultural or otherwise, of religious or charitable institutions. The *Khankah* being the beneficial owner of the property is certainly not liable to the tax, but a person employed by it, and who receives a remuneration or allowance from it, is liable—the remuneration or allowance being his private property. A *Mutwalli*, who has only to perform certain duties relating to the *wakf* properties on receipt of an allowance, is liable to the tax.

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(1) 2 M.I.A. 390 (420). (2) 20 C. 810.

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JUDGMENT.

The judgment of their Lordships was delivered by—

GHOSE, J.—The question which arises in this case is whether the *Sajjadanashin* of the Sasseram *Khankah* is assessable with income-tax under the provisions of s. 4 of Act II of 1886, in respect of such moneys as he draws from the properties appertaining to the *Khankah* for the purpose of his own maintenance and the maintenance of his family.

Section 4 of the Act prescribes: "Subject to the exceptions mentioned in the next following section, there shall be paid, in the year beginning with the 1st day of April 1886, and in each subsequent year, to the credit of the Government of India, or as the Governor-General in Council directs, in respect of the sources [679] of income specified in the first column of the second schedule to this Act, a tax at the rate specified in that behalf in the second column of that schedule." The word "income" has been defined in an earlier section, s. 3, and it means "income and profits accruing and arising or received in British India, and includes in the case of a British subject within the dominions of a Prince or State in India in alliance with Her Majesty, any salary, annuity, pension, or gratuity payable to that subject by the Government or by a local authority established in the exercise of the powers of the Governor-General in Council in that behalf." And referring to the definition of the word "salary," as herein mentioned, we find that it includes allowances, fees, commissions, perquisites or profits received, in lieu of or in addition to a fixed salary, in respect of an office or employment of profit, but subject to any rules which may be prescribed in this behalf, it does not include travelling, tentage, horse or sumptuary allowance, or any other allowance granted to meet specific expenditure. Section 5 of the Act lays down: "Nothing in s. 4 shall render liable to the tax—

"(a) Any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue or subject to a local rate assessed and collected by officials of the Government as such; or

(b) Any income derived from—

(i) Agriculture or (omitting the other portions of the section.)

(c) Any income derived from property solely employed for religious or public charitable purposes" and so forth.

In the present case the whole of the income which the *Khankah* derives, is from agricultural lands; and it follows therefore, in view of s. 5, to which we have just referred, that the income derived by the *Khankah* could not be assessed with income tax.

Now, the argument on behalf of the Secretary of State is this, that the *Sajjadanashin*, the plaintiff in this case when he draws any allowance or remuneration from the income of the *Khankah* property, he does so as an officer of the *Khankah* or as a *Mutwalli*, [680] and what he draws must be regarded as a "salary" within the meaning of s. 3 of the Act.

This argument brings us to the question, what is the true position of the *Sajjadanashin* of the Sasseram *Khankah*. His position has been considered in at least two cases before this Court, one in the year 1886 (1), and the other being the case of *Mohiuddin* v. *Sayiduddin* (2) in the year 1893. In the first mentioned case, it would appear from the udgment which was then delivered, that it was found that the whole of the endowment property had been made over to the *Sajjadanashin* for

(1) Unreported. (2) 20 C. 810.

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the time being, and remained in his uncontrolled possession for 15 or 16 years; and upon that ground the property was restored to him.

The learned Judge of the Court below relying upon the judgment of this Court in 1886, (1), and also upon certain passages in the judgment of this Court pronounced in 1893, (2) has come to the conclusion that the *Sajjadanashin* "has" the uncontrolled possession of the Farukhshayari properties which were regarded as devoted to religious purposes including the maintenance of the Superior and his family." The question seems to have been raised in the case of 1893, (1) whether the *Sajjadanashin* could be regarded as a *Mutwalli*, and as such liable to removal from office in the event of his spending upon himself more than he ought. Upon this question the learned Judges seem to have regarded the *Sajjadanashin* as not occupying the same position as a *Mutwalli* does; and in the course of the judgment, which they delivered, they expressed themselves as follows: "For example, where a *wakf* is created and no *Mutwalli* is appointed, or no provision is made for his allowance, the *kazi* is directed in making the appointment, or in fixing the allowance, not to allow the stipend to exceed one-tenth of the rents and profits of the *wakf* properties. But this provision does not and cannot apply, from the nature of the institution and the position of the *Sajjadnashin* in relation to it, to the endowment in dispute. In considering this question, we have to bear in mind the character of the person to whom the grant was made, the nature of the institution of which he was the founder, **[681]** and the rites and ceremonies connected therewith." And they proceeded to consider what was the true position of the *Sajjadanashin* of this *Khankah*, and they held that he occupied the position of a *dervish* or a *Sufi* of particular sanctity settled in the locality. Referring, then, to another case in this Court, *viz.*, the case of *Piran* v. *Abdul Karim* (2) they made the following observations: "These *dervishes* professed esoteric doctrines and distinct systems of initiation. They are mostly *sufis* or Eastern mystics. Some of them were followers of *Mian Roushan Bayezid*, who flourished about the time of the Emperor Akbar, and who had founded an independent esoteric brother-hood in many respects differing from the *sufis*, in which the Chief or *Pir* occupied a peculiarly distinctive position. So long as he lived the founder himself was the *Sajjadanashin*, the one seated on the prayer mat; in other words, the Chief or Superior. After his death some one among his heirs indicated by him as qualified to initiate the *murids* into mysteries of the *tarikat* or holy path, succeeds him in his office of *Sajjadanashin*. He is not only a *Mutwalli* but also a spiritual preceptor, and in him is supposed to continue the spiritual line (*Silsilla*)." There are abundant indications on this record that this is exactly the case with the *Khankah* of Sasseram. Shah Kabir was, as his title shows, a *dervish*, and from the evidence of the defendant it is clear that the doctrines supposed to be inculcated by those men are, as he calls it, of *tassawuf* or *sufism*. We have dwelt so far on the character of the institution, in order to show how materially it is connected with the personality of the *Sajjadanashin* or Superior. He is an integral part of the institution and the central figure, so to speak, therein. Its existence depends on his personality. This is evident from the very terms of the grant in question. It was this view which was practically enunciated by the Government in its letter of the year 1842, and substantially reiterated by the High Court in its judgment. Again, from the nature

(1) 20 C. 810. (2) 19 C. 203.

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of things, it would be impossible to spend more than a certain amount for the various religious purposes which, admittedly, ought to be performed in the *Khankah*, the *Imambara*, and the *Masjid*, or in respect of the students who live there. There is no provision for accumulation, and in the [682] absence of any sufficient evidence to show that the rites and ceremonies have not been properly performed, there is nothing in the Mahomedan law which warrants our saying that in taking the balance of the income for his maintenance and the maintenance of his family and relatives, the defendant committed a breach of trust such as would justify his removal." So that it seems to be pretty clear, that the position of the *Sajjadanashin* of the Sasseram *Khankah* is materially different from that of a *Mutwalli* of an ordinary *wakf* property; and we gather from the statements made before us by the learned Vakils, that the practice is for the *Sajjadanashin* to prepare, year after year, a budget showing how much is to be spent for the purpose of the *Khankah*, and how much is to be spent for his own maintenance, and the maintenance of his family. There is no rule, so far as we can discover (nor have we been informed anything to that effect) determining how much of the income should be spent upon the *Khankah*, and how much upon himself. Indeed, the expenditure depends entirely upon his own discretion. But, however, that may be, it could hardly be said, having regard to the judgment of this Court to which we have just referred, that the money that he appropriates out of the *Khankah* income, for his own maintenance, was a "salary" or remuneration for his services within the meaning of s. 3 of Act II of 1886.

Exception has been taken to the conclusion of the District Judge when he holds that the religious performances of the *Khankah* include the maintenance of the Superior and his family. It seems to us, however, from the very nature of the thing, and from the unique position of the *Sajjadanashin* of this *Khankah*, as expressed in the judgment of this Court to which we have referred, that his maintenance is really a part of the purpose for which the *Khankah* was established.

Upon all these grounds we are of opinion that the moneys drawn by the *Sajjadanashin* from the *Khankah* properties are not assessable with income-tax.

We accordingly dismiss this appeal with costs.

B. D. B. *Appeal dismissed.*

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27 C. 683.

[683] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Stevens.

SATYA PRASHAD PAL CHOWDHRY AND ANOTHER (*Defendants*) *v.* MOTILAL PAL CHOWDHRY AND OTHERS (*Plaintiffs*).*
[19th, 20th December, 1899 and 9th January, 1900.]

Probate and Administration Act (V of 1881), ss. 82 and 92—Direction in the will that all the executors will act jointly—Act of an executor who has taken out probate, and the others not having done so, how far binding on the estate of the testator.

Where by a will more than one person are appointed executors, and all of them jointly are empowered to alienate any property for payment of debts and to

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* Appeals from Original Decrees Nos. 377, 380 and 381 of 1898, against the Decrees of Babu Prasanna Kumar Ghose, Subordinate Judge of zillah Nuddia, dated the 30th of July 1898

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borrow money for the improvement and preservation of the estate of the testator, s. 92 of the Probate and Administration Act (V of 1881), by reason of any such direction in the will, does not disqualify one of the several executors, who alone has obtained probate, to act singly, the others having refused to accept service.

Where such an executor renewed *hatchittas* which were originally executed by the testator, in the same terms as the testator did, and a suit was brought upon these *hatchittas* against the heirs of the testator.

Held, that the debt was binding on the estate of the testator.

Farhall v. *Farhall* (1), referred to; and *Syed Nerul Hossein* v. *Sheo Sahai* (2), distinguished.

THESE appeals arose out of an action brought by the plaintiffs for recovery of a certain sum of money due on *hatchittas* or signed accounts. The allegations of the plaintiff were that the defendant's father Koilash Chunder Pal in the year 1289 B. S. borrowed a certain sum of money from them; an account having been settled, Koilash Chunder executed *hatchittas* in favour of the plaintiffs in the *Ramnavami* day of the year 1290 B. S., and commenced business with the plaintiffs on condition of paying interest on the said money at the rate of 12 annas per cent. per mensem, and renewing the *hatchittas* on the *Ramnavami* day of each succeeding year, reckoning the principal and interest due on that date as [634] principal, and allowing the same rate of interest on the whole amount. According to this practice he renewed *hatchittas* up to the *Ramnavami* day, *i.e.*, the 14th Cheyt of the year 1300 B. S; in the Assin of that year he died leaving a will and his widow Damini Dasi having taken out a probate to the said will on the security of defendants Nos. 1 and 2 became entitled to and obtained possession of the estate of Koilash Chunder as executrix; and she continued to renew the *hatchittas* year after year, and got the said *hatchittas* signed by her son, defendant No 2; in the year 1303 B. S. a dispute having arisen among the defendants, she did not renew the *hatchitta* any more; that the defendant's mother, Damini Dasi, while acting as executrix, borrowed Rs. 1,500 from the joint *karbar* of the plaintiffs for the benefit of the estate, and executed a *hatchitta* in favour of plaintiff No. 3, on the 6th Baisak 1303 B. S., on condition of paying interest at one rupee per cent. per mensem; and subsequently on the 22nd Jeyt of the said year she borrowed Rs. 100 through her son defendant No. 2 on the aforesaid terms; that the probate obtained by the defendant's mother was revoked by the District Judge of Nuddia on the objection of defendant No. 1 on the 11th August 1896, and on appeal to the High Court on the basis of the *solenamah*, with the consent of all parties, the order for setting aside the probate was maintained; that according to the terms of the will of Koilash Chunder, his sons and heirs, the defendants, became entitled to and obtained possession in equal shares of the estate left by him; that in spite of demands made by the plaintiffs, the defendants did not pay the amount due to them. The defence, *inter alia*, was that the suit was barred by limitation; that the plaintiffs were not entitled to maintain the suit without joining their mother as a plaintiff; that Damini Dasi did not execute the *hatchitta*; that she had no power to borrow money or renew *hatchittas* as an executrix.

By the will five persons were appointed executors, and they were jointly empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate. The

(1) (1871) L.R. 7 Ch. App. 123. (2) 19 I.A. 221.

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first defendant No. 1, eldest son of the testator, never applied for probate, but stood as security when probate was granted to Damini Dasi; the second never applied for probate, and was one of the plaintiffs in this suit; the third was dead, [685] when probate was granted to Damini Dasi, the fourth never applied for probate, and was a *naib* or agent of Damini Dasi, and the fifth, Damini Dasi, was the only person who applied for and obtained probate.

It appeared upon the evidence that two of the sons of Damini Dasi, defendants Nos. 2 and 3, conducted the monetary affairs of the estate on her behalf, and defendant No. 2 signed her name in the *hatchittas* as her agent, while defendant No. 1 admitted that the amount claimed was justly due, and moreover when the plaintiffs were about to institute their suits, two of the defendants induced them to forbear for a time upon promise of payment or renewal of *hatchittas*.

The Court of first instance gave the plaintiffs a decree. Against this decision the defendants Nos. 2 and 3 appealed to the High Court.

DECEMBER 19. Dr. *Rash Behari Ghose* (with him Babu *Jogesh Chunder Roy*, Babu *Soshi Shekhur Bose* and Babu *Amar Nath Bose*), for the appellants.—There being a provision in the will that all the executors will act together, the executrix, Damini Dasi, who took out probate, could not act alone, and therefore had no authority to renew the *hatchittas*. That being so, the defendant-appellants were not liable to pay—see s. 92 of the Probate and Administration Act. Damini Dasi is personally liable for it. The debts could not bind the estate of the testator in the hands of the appellants—see the case of *Farhall* v. *Farhall* (1). By the renewal of the *hatchittas*, Damini Dasi, the executrix, made herself personally liable for the debt. An executor cannot after the death of the testator enter into any contract as executor which could bind the estate—see *Corner* v. *Shew* (2). In the present case the executrix renewed the *hatchittas*, agreeing to pay compound interest, the effect of which would be not to free the testator's estate of its debts, but to add to its burdens. In such a case the executor is only personally liable, and the debt could not be binding on the estate—see *Signell* v. *Harpur* (3), *Childs* v. *Monius* (4). [686] Damini Dasi alone took out the probate, the other executors appointed by the will could have acted without doing so—see *Watkins* v. *Brent* (5). *Krishna Kinkur Roy* v. *Rai Mohun Roy* (6). The other executors, who could have acted without taking out the probate, not having joined in the renewal of the *hatchittas*, the act of Damini Dasi could not bind the estate of the testator.

DECEMBER 19, 20: Babu *Saroda Churn Mitter* (with him Babu *Haro Kumar Mitter*), for the respondent.—Section 92 of the Probate and Administration Act does not contemplate a case where more than one person having been appointed executors to the will of a testator, who directed that all the executors should act jointly, only one person has taken out probate, and the others either did not take out probate or refused to act. It contemplates a case where all the executors have taken out probate. In the present case Damini Dasi alone took out the probate, the others did not do so. That being so, the renewal of her *hatchittas* by her would bind the estate of the testator, in the hands of the defendant-appellants. It is only the executors who have obtained probate who can act as

(1) (1871) L. R. 7 Ch. App. 123.
(2) (1838) 3 M. & W. Rep. 350.
(3) (1850) 4 Excheq. Rep. 773.
(4) (1821) 2 Brod. & Bing. 460 (463).
(5) (1835) 1 Mylne & Craig 97 (104).
(6) 14 C. 37.

representatives of the testator—see s. 82 of the Probate and Administration Act. In this case the demand arises in consequence of a contract made with the testator, and therefore the renewal of the *hatchittas* by the executrix did not make her personally liable—see the cases of *Dowse* v. *Coxe* (1) and *Powell* v. *Graham* (2).

Dr. *Rash Behary Ghose* in reply.

Cur. adv. vult.

JANUARY 9. The judgment of the High Court (BANERJEE and STEVENS, JJ.) was as follows:—

JUDGMENT.

This appeal* arises out of a suit brought by the plaintiffs-respondents against three persons, namely, Pramatha Nath Pal Chowdhry, Satya Prosad Pal Chowdhry, and Lolit Mohun Pal Chowdhry, for recovery of a certain sum of money due on *hatchittas* or signed accounts on the allegation that the late Koilash [687] Chunder Pal Chowdhry, father of the defendants, carried on monetary dealings, with the plaintiffs on *hatchittas*, on condition of paying interest at the rate of 12 annas per cent. per mensem and of renewing the *hatchitta* on the *Ramnavami* Puja day of each year, so that interest at the said rate might run from that day on the amount due as principal and interest; that Koilash Chunder Pal Chowdhry died in Assin 1300, after having executed his last *hatchitta* on the 14th of Cheyt preceding, for Rs. 27,527 odd; that on his death his widow Damini Dasi, mother of the defendants, having obtained probate of his will on the security of defendants 1 and 2, continued renewing his *hatchitta* year after year down to Cheyt 1302, as his executrix, her name being signed by defendant No. 2; that the said Damini Dasi as the executrix of Koilash Chunder Pal Chowdhry and for the benefit of his estate borrowed from the plaintiff a further sum of Rs. 1,600, promising to pay interest at 1 per cent. per mensem; and that subsequently on the objection of defendant No. 1, Promatha Nath Pal Chowdhry, the grant of probate to Damini Dasi having been revoked, the defendants under the will of their father have become possessed of his estate, and are liable for the amount claimed. The defence was limitation, denial of the plaintiff's right to sue without joining their mother as a plaintiff, denial of the execution of *hatchittas* by Damini Dasi, and denial of her power as executor to borrow money or renew *hatchittas*.

The Court below has found for the plaintiffs upon all the issues raised in the case and has given them a decree.

Against that decree defendants Nos. 2 and 3, Satya Prosad Pal Chowdhry and Lolit Mohan Pal Chowdhry, have preferred this appeal; and it is contended on their behalf, *first*, that the Court below is wrong in holding that Damini Dasi alone was competent to exercise the powers of an executor when the will of Koilash Chunder Pal Chowdhry appoints not her alone but her and four other persons as executors, and directs that they shall act jointly; *secondly*, that, even if Damini Dasi was competent to act alone, the Court below is wrong in holding that the renewal of *hatchittas* by her as executrix was binding on the estate of the testator; *thirdly*, that, even if Damini Dasi was competent to act alone, the Court below was further wrong in holding that the estate of the testator was [688] liable to pay the money borrowed by her; and *fourthly*, that the

* Appeal No. 377.

(1) (1825) 3 Bingham, 20.

(2) (1817) 7 Taunton, 581.

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Court below ought to have held that the plaintiffs were not competent to maintain this suit without joining as a co-plaintiff their mother as heir of their deceased brother, who had a share in the money sued for.

In support of the first contention, paragraph 1 of the will of Koilash Chunder Pal Chowdhry and s. 92 of the Probate and Administration Act (Act V of 1881) are relied upon.

Paragraph 1 of the will no doubt shows that five persons, of whom Damini Dasi is one, were appointed executors, and that all the executors jointly are empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate. And s. 92 of Act V of 1881 enacts that "when there are several executors or administrators the powers of all may, in the absence of any direction to the contrary in the will or grant of letters-of-administration, be exercised by any one of them, who has proved the will or taken out administration." The effect of this section, so far as it relates to executors, is, in our opinion, this, that where several executors obtain probate and the will directs them all to act together, none of them can act singly; but the section is not intended to disqualify, by reason of any such direction in the will, one of several executors who alone has obtained probate, the others having either renounced or refused to accept office. This view is supported by s. 82 of the Probate and Administration Act, which shews that it is only the executors, who have obtained probate, that can act as representatives of the testator; and we think it but reasonable that an executor, who renounces or refuses, or is unable to act, should be regarded as if he had never been appointed.

This being our view of the law, let us see how the facts stand. Of the five persons appointed as executors, the first, Promatha Nath Pal Chowdhry, defendant No. 1, the eldest son of the testator, never applied for probate, but stood as security when probate was granted to Damini Dasi; the second, Tarini Prosad Pal Chowdhry, never applied for probate and is one of the plaintiffs in the suit; the third, Mohendra Nath Biswas, was dead when probate was granted to Damini Dasi; the fourth, Hira Lal Pal, a son-in-law of [689] the testator, never applied for probate, and was, as his own deposition shews, a *naib* or agent of Damini Dasi; and the fifth, Damini Dasi, is the only person who applied for and obtained probate. Thus the three executors other than Damini Dasi, who were alive when the last-named person applied for and obtained probate, if they had not formally renounced, must be taken practically to have refused to accept office. Damini Dasi was therefore, in our opinion, competent to act as executrix. We may add that the defendants, who were the beneficiaries under the will, and in particular two of them, namely, the two appellants, as appears from the depositions of defendants 1 and 2, acted for their mother Damini Dasi, and in fact did all that was done in her name as executrix.

For the foregoing reasons the first contention of the appellants must, in our opinion, fail.

Upon the second point, it is urged for the appellants that, even if Damini Dasi was competent to act alone as executrix, she could not in that capacity bind the estate of the testator by executing the *hatchittas* in question, especially when by so doing she had heavily increased the debt originally due from the testator by allowing compound interest to be charged. It is argued that a contract of borrowing made by an executor only binds him personally, and that the only liability created by the *hatchittas* is a personal liability of the executrix; and in support of this

argument, *Farhall* v. *Farhall* (1), and certain other cases referred to in Williams on Executors, Pt. IV, Bk. II, Ch. II, para 1, are relied upon.

No doubt one of the primary duties of an executor is to free the testator's estate of its debts and liabilities and not to add to its burdens; and for that purpose he can alienate the property of the testator subject only to certain restrictions. It is only in certain special circumstances that an executor's promise to pay money can bind the estate of the testator. Mellish, L. J., in the case of *Farhall* v. *Farhall* (1), cited for the appellants, after quoting from Williams' work on Executors, the following statement of the law (9th edition, p. 1661) :—" The more modern authorities [690] have, however, established in several instances the executor may be sued as executor on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator," observes :—" But if we look through the different cases which follow that statement, it will be found that in every one the consideration for the promise of the executor was a contract or transaction with the testator." And a little further on, after referring to two other cases—*Dowse* v. *Coxe* (2) and *Powell* v. *Graham*(3)—the learned Judge says : "That shews no doubt that a count for money paid for the use of an executor is a good count to charge him in his representative character, when the demand arises in consequence of a contract made with the testator." Let us then see what the demand in this case arises from and how far the consideration for the promise of the executrix arose out of a contract or transaction with the testator. The *hatchittas* in question were given by the executrix in successive renewal of *hatchittas* originally executed by the testator and renewed by him year after year on the *Ramnavami* day, and interest was allowed on interest in the *hatchittas* executed by the executrix in accordance with the practice followed by the testator himself. This fact is proved by the deposition of the plaintiff, Mati Lal Pal Chowdhry, and is not disputed. That being so, we think the Court below was right in holding that the *hatchittas* executed by Damini Dasi as executrix were binding on the estate of the testator in the hands of the defendants.

There is another reason why these *hatchittas* should be held to be binding on the estate in the hands of the defendants. As we have observed in dealing with the first contention of the appellants, it is proved by the evidence of the defendants 1 and 2 and of other witnesses, that when Damini Dasi was in possession of the testator's estate as executrix, two of her sons, namely, the defendants 2 and 3, the appellants before us, conducted the monetary affairs of the estate on her behalf, and defendant No. 2 signed her name in the *hatchittas* as her agent; while defendant No. 1, who has not appealed against the decree, admitted [691] in the Court below that the amount claimed was justly due. Moreover, when the plaintiffs in this and in another analogous suit, out of which appeal No. 380 arises, were about to institute their suits, the defendants or two of them (see the depositions of Hari Prosad Chatterjee and Narahari Mukerjee) induced them to forbear for a time upon promise of payment or renewal of *hatchittas*. It was argued for the appellants, upon the authority of the case of *Syed Nurul Hossein* v. *Sheo Sahai* (4), that as the defendants were then acting as agents of Damini Dasi, their representations could not bind them now when they are

(1) (1871) L. R. 7 Ch. App. 123.
(2) (1825) 3 Bingham 20.
(3) (1817) 7 Taunton 580.
(4) (1892) 19 I. A. 221.

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sued in their capacity as beneficiaries. This argument is not sound. The case cited is quite distinguishable from the present. For there the representations relied upon were made by a person who never was the reversionary heir to the widow for whom he acted as her agent, and who neither professed nor had any right to act in any other capacity than that of agent; whereas here the defendants were the beneficiaries of the estate, and only one of them was the agent of Damini Dasi. The true view of the facts is clearly this, that while Damini Dasi acted as executrix in name, the business in connection with the renewal of the *hatchittas* was really conducted by her sons, the defendants, who were then, as they are now, the beneficiaries. It is not therefore open to them to question the binding character of the *hatchittas*. The second contention of the appellants must therefore also fail.

Nor has the third contention much force. It is true that a part of the claim in this suit is made up of two sums of Rs. 1,500 and Rs. 100 borrowed by Damini Dasi as executrix. But she had power under the will to borrow money as executrix for the improvement and preservation of the estate; and the evidence [see the depositions of defendant No. 1, Promatha Nath Pal Chowdhry, and the plaintiff, Moti Lal Pal Chowdhry, and Exs. 1 (4) and 4] amply shews that the money was borrowed for paying off a certain decree in excution of which a portion of the immoveable property belonging to the estate had been advertized for sale. It was argued by the learned vakil for the appellants that as the power of borrowing money was given to [692] five persons jointly, one of them, Damini Dasi, could not exercise that power singly. The answer to this argument is that the power was given not to the five persons in their individual capacity, but to them as executors and by virtue of their office; and if, as we have said above, Damini Dasi was, by reason of the death of one of the executors and refusal of the other three to act, alone competent to act as executrix, she was also competent to exercise the power of borrowing money by virtue of her office as executrix. The view we take is in accordance with that taken in the case of *Crawford* v. *Forshaw* (1).

Upon the fourth and the last contention, it is enough to say that the evidence of the plaintiff, Moti Lal Pal Chowdhry, which is unrebutted, and which we see no reason to disbelieve, shews that his mother had many years before suit relinquished in favour of him and his brothers the right she had acquired by inheritance in the share of his deceased brother in the money claimed in this suit.

The contentions urged before us therefore all fail, and this appeal must consequently be dismissed with costs.

This judgment will govern appeals from original decrees Nos. 380 and 381, which are analogous to this case, with only this difference that the third and fourth contentions raised in this appeal do not arise in them. Appeals from original decrees Nos. 380 and 381 will accordingly be also dismissed with costs.

S. C. G. *Appeal dismissed.*

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(1) (1891) L. R. 2; (1891) Ch. Vol. II, p. 261.

27 C. 692=4 C.W.N. 750.

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MARCH 23.

CRIMINAL REVISION.

27 C. 692=4 C.W.N. 750.

CRIMINAL REVISION.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Macpherson.

AHMED HOSSEIN (*Appellant*) *v.* THE QUEEN-EMPRESS (*Respondent*).*
[12th, 13th and 14th February and 23rd March, 1900.]

Arms or ammunition—Possession of or control over—Search, legality of—Sanction to prosecute—Code of Criminal Procedure (Act V of 1898), *ss.* 55, 103 *and* 165—*Arms Act* (*XI of* 1878), *ss.* 19, 20, 25, 29 *and* 30.

[693] The license of the accused for the possession of firearms and ammunition was cancelled in August 1897. He was suspected of being in possession of arms after the cancellation of his license. On the 23rd of April 1899, the Assistant Magistrate of Purneah with a number of police went to the house of the accused to search for arms. They surrounded it, arrested the accused and then searched his house. The police had no search warrants, nor was there anything to show upon what charge the accused was arrested. Two gun stocks, some ammunition and implements for reloading were discovered in the house. There was nothing to show that the sanction required by s. 29 of the Arms Act was given before proceedings were instituted against the accused. Accused was convicted and sentenced under ss. 19 and 20 of the Arms Act.

Held, that the conviction under s. 20 was not sustainable, but that the accused must be taken to have had arms and ammunition as defined by the Arms Act within the meaning of sub-section (*f*) of s. 19 of that Act and the conviction under that section must be confirmed.

Held further that with respect to the question of whether or not any previous sanction had been given under s. 29 of the Arms Act, the Court was not unmindful of the suggestion that the charge in this case was, in the first instance, in respect of an alleged offence under s. 20 and not of one under s. 19; but that ss. 19 and 20 were so interwoven that it was difficult to see how an offence could be committed under the first paragraph of s. 20 unless an offence under one of the enumerated sub-sections in s. 19 had also been committed. It was not suggested that the charge here was an offence under the second paragraph of s. 20.

[F., 14 Cr.L.J. 41=18 Ind. Cas. 265=9 P.R. 1912 Cr.=128 P.L.R. 1913=44 P.W. R. 1912 Cr.]

IN this case it appeared that the Magistrate of Purneah, in August 1897, cancelled certain licenses granted in that neighbourhood, and among them any license held by the accused for the possession of arms and ammunition. The accused was called upon to deliver up any arms he possessed after the license had been cancelled, and he delivered up the barrel of a muzzle-loading gun. He was, however, suspected of having other arms in his possession.

On the 23rd of April 1899 the Assistant Magistrate of Purneah together with a large number of police proceeded to the home of the accused, who appeared to be a man of position and means; their object being to search for arms in his house. They reached the accused's house at daybreak, and having surrounded it, at once arrested him and had him photographed, and then proceeded to search the house.

The police had no search-warrants, nor was there anything to **[694]** show upon what charge the accused was arrested. The search resulted in the finding of the stocks of two guns, some loaded and unloaded cartridges, and implements for reloading. The accused was removed in custody. There was nothing to show definitely when proceedings against

* Criminal Appeal No. 35 of 1900, made against the order passed by W. H. Vincent, Esq., Sessions Judge of Bhagulpore, dated the 3rd January 1900.

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the accused were first instituted or whether the sanction required by s. 29 of the Arms Act was given before those proceedings were instituted or what in the first instance, was the precise charge made against the accused, who, it appeared, had been kept in custody for nearly a fortnight until released on bail by an order of the High Court about the 12th or 14th of May. The accused was subsequently committed to the Sessions, and was convicted on the 3rd January 1900 by the Sessions Judge of Bhagulpore, of an offence under ss. 19 and 20 of the Arms Act of 1878, and sentenced to six weeks rigorous imprisonment and a fine of Rs. 500.

Mr. *Jackson* (Mr. *K. N. Chowdhuri* with him), for the appellant. There is nothing on the record to show how the proceedings in this case originated, nor upon what the police proceeded to take steps. The accused was in possession of a license for 15 or 17 years until 1897, when it was cancelled, and when called upon he gave up his gun.

With regard to the steps taken by the Assistant Magistrate and the police, every provision of law appears to have been broken. The search could not possibly have been held in view of the charge apart from the illegal manner in which it was held. It is clear the search was not made under s. 25 or 30 of the Arms Act, nor under s. 165 of the Code of Criminal Procedure. There was no search-warrant, nor is it pretended that there was one. The search was, I submit, illegal, and that being so the conviction must go, as the accused could not be held responsible for what occurred at that search. Then, again, what right had they to arrest him ; there was no warrant, nor could it be said that s. 55 of the Code of Criminal Procedure applied.

Under s. 103 of the Code the list of things found during the search must be prepared in the presence of witnesses at once and signed by them; here a list in English was put in, prepared from notes made by the District Superintendent of Police. It bears thumb-marks, but it is not shewn that the [695] witnesses to it could read English. Apparently proceedings under s. 110 of the Code were first instituted against the accused ; these, however, were dropped after the 25th of April, from that date the proceedings became a prosecution under the Arms Act. Sanction was necessary under s. 29 of that Act ; the so called sanction was given on the 29th of April after the proceedings had commenced. See *Reg.* v. *Parshram Keshav* (1) and *Queen Empress* v. *Morton* (2).

Under s. 29 of the Arms Act sanction is necessary in order to prosecute for an offence under s. 19, sub-section (*f*), of that Act ; that being so it is obviously necessary in order to take action under s. 20. Further under s. 20 of the Arms Act concealment must be at the time of search, the police, however, had him hard and fast, so that he could not possibly have concealed anything at that search.

The Deputy Legal Remembrancer (Mr. *Leith*), for the Crown.

Cur. adv. vult.

MAR. 23, 1900. The following judgment was delivered by MACLEAN, C. J. (MACPHERSON, J., concurring)—

JUDGMENT.

On the 23rd of April 1899, the Assistant Magistrate of Purneah proceeded to search the house of the prisoner, who appears to be a man of position and means, and took with him two Superintendents of Police,

(1) 7 B. H. C. Cr. 61. (2) 9 B. 288.

several Inspectors of police and a number of Constables and Chowkidars, the whole constituting, in point of numbers, a small army of about sixty men. Their object was to search for arms in the house of the prisoner. They reached his house at daybreak; they surrounded the house, went in, and at once arrested the prisoner and had him photographed. Some of the witnesses say—photographed with a constable holding him by the hand or arm—and then proceeded to search the house. The police had no search-warrant, nor is there anything to show upon what charge the prisoner was arrested. The search lasted practically throughout the day, with the result that the stocks of two guns, some loaded and unloaded gun and revolver cartridges, a ramrod, a box of percussion caps, and a gun case with reloading implements for cartridges, and some empty powder [696] flasks were found on the premises. The articles so found must be taken to be arms and ammunition, within the meaning of the Arms Act, XI of 1878, and they must be taken to have been in the possession of the prisoner within the meaning of sub-section *(f)* of s. 19 of that Act. The prisoner was removed in custody.

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What subsequently took place is involved in some little obscurity. The materials before us do not enable us to say definitely when any proceedings against the prisoner were first instituted, or whether the sanction required by s. 29 of the Arms Act was given before those proceedings were instituted or what, in the first instance, was the precise charge made against the prisoner, and the learned Deputy Legal Remembrancer, who appeared for the Crown, has not been able to enlighten us upon these points. The prisoner, however, appears to have been kept in custody for nearly a fortnight, until he was released on bail by an order of this Court, about the 12th or 14th of May. Ultimately he was committed to the Sessions Court at Bhagulpore, and convicted on the 3rd January last of an offence under ss. 19 and 20 of the Arms Act of 1878, and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 500. Both the assessors were for acquitting the prisoner.

I must say, I am at a loss in the absence of explanation, to understand the action of the police in this matter. I do not understand upon what charge the appellant was arrested, why he was photographed, what right the police had to photograph him, least of all in custody, or in the absence of a search-warrant under what authority the search was made. It is not suggested that the search was made under s. 25 of the Arms Act, though I notice in his questions to the assessors the Sessions Judge puts it as a search under s. 25, whilst in his judgment he treats the search as one made under s. 165 of the Criminal Procedure Code. No attempt has been made at the Bar to treat the search as one made under s. 25 of the Arms Act, and the learned Deputy Legal Remembrancer has not been able to assist us in elucidating the reasons for the action of the police, which appears to me to have been high handed and arbitrary. It is equally unfortunate that the prisoner was detained in custody [697] so long and not allowed out on bail, until he was released on bail by an order of this Court, which indicates clearly that this Court thought it was a case for bail. We have heard no argument that the search was properly made under s. 165 of the Code of Criminal Procedure or that the arrest was properly made under s. 55 of the same Code.

With respect to the question of whether or not any previous sanction had been given under s. 29 of the Arms Act I am not unmindful of the suggestion that the charge here was, in the first instance, in respect of an alleged offence under s. 20 and not of one under s. 19; but ss. 19

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and 20 are so interwoven that it is difficult to see how an offence can be committed under the first paragraph of s. 20, unless an offence under one of the enumerated sub-sections in s. 19 has also been committed. It is not suggested, save in the Sessions Judge's questions to the assessors, that the charge here was an offence under the second paragraph of s. 20 of the Arms Act. Nor could it have been successfully, for the provisions of s. 25, were not complied with in this case.

As regards the charge under s. 20, I entertain a grave doubt whether the evidence is sufficient to justify a conviction under that section, and whether the first paragraph of that section applies to a case such as the present. The accused is entitled to the benefit of that doubt, and in my opinion the conviction under s. 20 is not sustainable.

The accused, however, must be taken to have had in his possession or under his control, arms and ammunition as defined by the Arms Act of 1878 within the meaning of sub-section (*f*) of s. 19 of that Act, and in my opinion the conviction under that section must be confirmed. I think, however, that the sentence passed was far too severe, and that under the circumstances of the case, a much more lenient sentence would have met the justice of the case. I understand that the prisoner has already undergone some days of rigorous imprisonment before he was again admitted to bail by this Court; and in my opinion, the imprisonment he has already undergone is an ample punishment for the offence which he has committed. In the result, then, the conviction under s. 20 must be set aside and that under s. 19 must be sustained, **[698]** and the sentence must be the number of days of rigorous imprisonment, which the prisoner has already undergone. The prisoner, then, will be at once discharged and the fine of Rs. 500 must be remitted, and, if paid, must be refunded.

D. S.

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27 C. 698=4 C.W.N. 586.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

CHUNDER KUMAR MUKERJEE AND OTHERS (*Plaintiffs*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (*Defendants*).* [4th April, 1900.]

Public Demands Recovery Act (Bengal Act VII of 1880*)*, *ss.* 2, 8, 10 *and* 12—*Bengal Act VII of* 1868, *ss.* 2 *and* 8—*Sale for arrears of cesses—Suit to set aside such a sale on the ground that no notice was issued under s.* 10 *of the Act, whether maintainable in the Civil Court.*

A suit to set aside a sale held for arrears of cesses on the ground that no notice of the certificate under s. 10 of Bengal Act VII of 1880 was served upon the plaintiff is maintainable in the Civil Court.

Baijnath Sahai v. *Ramgut Singh* (1) and *Sarcda Charan* v. *Kista Mohun* (2) referred to.

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* Appeal from Appellate Decree No. 711 of 1898, against the decree of Babu Behari Lal Mullick, Subordinate Judge of Faridpur, dated the 11th of January 1898, affirming the decree of Babu Mohim Chunder Chuckerbutty, Munsif of Madaripur, dated the 16th of March 1897.

(1) 23 C. 775. (2) 1 C.W.N. 516.

[N.F., 34 C. 787 (798) = 11 C.W.N. 745; F., 28 C. 813 (815); 1 C.L.J. 550 (556); 3 C. L.J. 280 (284); 5 C.L.J. 555 (558, 559); 5 C.L.J. 638 (640); 6 C.W.N. 331 (332); R., 29 C. 73 (90) (F.B.) = 5 C.W.N. 521; 31 C. 274 (278) = 8 C.W.N. 207 (210); 34 C. 241 (244) = 5 C.L.J. 385 (387); 34 C. 811 (F.B.) = 5 C.L.J. 696 = 11 C.W.N. 756; D., 2 Ind. Cas. 26 = 5 N.L.R. 35 (36).]

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APPELLATE CIVIL.

27 C. 698 = 4 C.W.N. 586.

THE plaintiffs brought a suit in the Court of the Munsif at Faridpur to set aside the certificate and the sale of certain lands held by the Collector under a certificate issued under the Public Demands' Recovery Act, and for confirmation of possession thereof. The allegations of the plaintiffs were that no notice of the certificate was served upon them; that no sale processes were published as required by the law, and, if they were published, they were irregular, illegal and fraudulent; that, inasmuch as they could not know of the sale in proper time, they were unable to prefer an appeal to the Commissioner of the Division, impugning the validity of the sale. The plaintiffs through their pleader stated **[699]** that there were no cesses due at the time when the sale took place. The defence of the defendants was that the plaintiffs' only remedy was by way of an appeal to the Commissioner, and they not having preferred an appeal, the suit was not maintainable in the Civil Court; that the suit was barred by limitation; that the proceedings were all regular, and as such the sale was not liable to be set aside. The Court of first instance dismissed the plaintiffs' suit. On appeal the Subordinate Judge, while assuming that the notice was not duly served, but relying upon the provisions of s. 8 of Bengal Act VII of 1880, and the case of *Troyluckho Nath* v. *Pahar Khan* (1), held that the Civil Court had no jurisdiction to set aside the sale and confirmed the decision of the first Court.

Against this decision the plaintiffs appealed to the High Court.

Babu *Lal Mohun Das* (with him Babu *Chunder Kant Sen*), for the appellants.—The case of *Troyluckho Nath* v. *Pahar Khan* (1) is quite distinguishable from the present case. In that case the sale was sought to be set aside, not on the ground of non-compliance with the provisions of s. 10 of Bengal Act VII of 1880, but on the ground of irregularity. Where a sale is sought to be set aside on the ground that no notice of the certificate was served, a suit in the Civil Court is maintainable. The cases of *Baijnath Sahai* v. *Ramgut Singh* (2) and *Saroda Charan* v. *Kista Mohun* (3) support this view. A suit to set aside a sale for arrears of cesses will lie, although no previous appeal has been made to the Commissioner; see the case of *Mohibul Huq* v. *Shew Sahay Singh* (4). The lower Court has relied upon s. 12 of the Act as barring the present suit. But s. 12 pre-supposes a case where a notice has been issued. Where a certificate was issued upon a wrong person, who had ceased to be an owner, the Privy Council held that a sale in pursuance of such a certificate was illegal; see *Mahomed Abdul Hai* **[700]** v. *Gujraj Sahai* (5). It was never suggested in that case that a Civil Court had no jurisdiction.

Babu *Ram Churn Mitter* (the Senior Government Pleader), for the respondent.—This is a suit to set aside a sale on the ground that the certificate was bad in law. Under the provisions of s. 12 of Act VII of 1880, it is not absolutely necessary that there should be a notice. The second portion of the section says—"where no such notice has been duly served." It contemplates a valid certificate, where no notice under s. 10 has been duly served. Unless the certificate itself is set aside, the Civil Court cannot have any jurisdiction to set aside the sale under s. 20 of the

(1) 23 C. 641. (2) 23 C. 775. (3) 1 C.W.N. 516.
(4) 25 C. 85. (5) 20 C. 826.

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Act. As no cause has been made out to set aside the certificate under s. 8, the sale cannot be set aside. The appellant's remedy was to apply to the Commissioner for setting the sale aside, and, he not having done so, was precluded from bringing this suit in the Civil Court.

The following judgments were delivered by the High Court (MACLEAN, C. J. and BANERJEE, J.)

JUDGMENTS.

MACLEAN, C. J.—I think, though with some little doubt, that there must be a remand in this case to the lower appellate Court, for that Court either to take the evidence itself, or send the case to the first Court to do so, for the determination of the question whether the Collector issued to the judgment-debtor a copy of the certificate upon which the sale was based and notice in Form IV in the second schedule annexed to Act VII (B.C.) of 1880, in other words, to ascertain and determine whether the provisions of s. 10 of the Act were strictly and properly complied with. I direct this remand, because in my opinion the finding of the Court below is not quite so explicit as it ought to be, though I should rather infer from his language that it was the Judge's intention to find that the notice had not been duly served in accordance with the provisions of s. 10. If the Court should find that the provisions of s. 10 have not been complied with, then in my opinion the sale cannot stand, and I feel no difficulty in holding that the Civil Court has jurisdiction to entertain a suit to set aside the sale.

[701] It was contended that there is no jurisdiction in the Civil Court to entertain a regular suit to set aside the sale, having regard to the provisions of s. 2 of Act VII (B.C.) of 1868. But that section only enables the Commissioner of Revenue to "receive an appeal:" it does not make it compulsory upon the judgment-debtor, who complains of the sale, to appeal to that tribunal, nor does it deprive him of his right to institute a regular suit to set aside the sale. If the case of *Troyluckho Nath* v. *Pahar Khan* (1) decide the contrary, I respectfully differ from its conclusion, which appears to me to be inconsistent with the cases to which I am about to refer.

I am unable to accept the contention of the learned Senior Government Pleader for the Secretary of State, that a sale cannot be set aside until the certificate has been set aside, and that a certificate can only be set aside on some or one of the grounds stated in the sub-section (*b*) of s. 8 of Act VII (B. C.) of 1880. That view appears to me to be inconsistent with the decision of the Privy Council in the case of *Baijnath Sahai* v. *Ramgut Singh* (2) with that in the case of *Mahomed Abdul Sahai* v. *Gujraj Sahai* (3), and with the decision to which I was myself a party in the case of *Saroda Charan* v. *Kista Mohun* (4). The case of *Baijnath Sahai* v. *Ramgut Singh* (2) indicates how important it is in cases of this class that the requisites preliminary to a sale should be strictly complied with. In neither of the Privy Council cases, to which I have referred, was it suggested that a regular suit would not lie to set aside the sale, or that the judgment-debtor's only remedy was an appeal under s. 2 of Act VII (B.C.) of 1868. As regards the argument under s. 8 of Act VII (B.C.) of 1880, the plaintiff's case is that it is the sale and not the certificate he wants to have set aside, and he claims to have it set aside, on the ground that the provisions of s. 10 were not complied with, and

(1) 23 C. 641. (2) 23 C. 775. (3) 20 C. 826. (4) 1 C.W.N. 516.

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that, until he was served with the notice under that section, the certificate did not bind his immoveable property, and that, as he was never [702] served with such notice, his immoveable property never became bound by the certificate, and in this view he says it is immaterial to him whether or not the certificate is set aside, so long as the sale is. I do not think there is anything in s. 8 which prevents his instituting this suit. I may add that s. 8, which only refers to a suit to contest his liability to pay the amount stated in the certificate and to have the certificate cancelled, pre-supposes service under s. 10. I am unable therefore, to accept the view of the law as laid down by the lower appellate Court, but, as the Secretary of State asks for it, there will be a remand on the point I have mentioned. The respondents, however, must pay the costs of this appeal.

BANERJEE, J.—I am of the same opinion. The plaintiff-appellants brought this suit to set aside the sale of the property in dispute under a certificate made under Act VII (B. C.) of 1880 on certain grounds, one of which was that no notice of the certificate had been issued to the plaintiffs. The lower appellate Court, while finding that no notice under s. 10 of the Act had been proved, has nevertheless dismissed the suit, as it is of opinion that the plaintiffs were not entitled to maintain the suit, because they did not make any application under s. 12 of the Public Demands' Recovery Act, and further because they failed to show, as required by s. 8 before any certificate could be set aside by the Civil Court, that the debt covered by the certificate was not really due, or that it had been paid or discharged.

The plaintiff-appellants contend that the Court of appeal below is wrong in holding that the suit was not maintainable, and that it ought to have held that when no notice under s. 10 of Act VII (B.C) of 1880 was proved, all proceedings had for the enforcement of the certificate were void; and in support of this contention the decision of the Privy Council in the case of *Baijnath Sahai* v. *Ramgut Singh* (1) and the case of *Saroda Charan* v. *Kista Mohun* (2) are relied upon.

The cases cited bear out the appellants' contention, and the only way in which the learned Senior Government Pleader attempts to meet that contention and to support the judgment [703] of the Court below, is by arguing that s. 12 of the Public Demands' Recovery Act contemplates the possibility of execution proceedings being taken, notwithstanding that no notice under s. 10 is duly served, and that s. 20 of the Act by implication shows that a sale of immoveable property can be set aside by the Civil Court only where the certificate is set aside by such Court, and as no cause has been made out for the setting aside of the certificate under s. 8 of the Act, the Courts below are right in holding that the suit cannot succeed.

Now with reference to s. 12 it will be enough to say that, although it contemplates the possibility of a debtor under a certificate applying to the Collector to set aside the certificate upon becoming aware of its existence not by a notice under s. 10, but by the issue of any process of execution, it does not show that notwithstanding the absence of a notice under s. 10, the certificate is as valid and has as much force, as if such notice had been issued. On the contrary, there are express provisions in the Act, in ss. 10 and 18, to the effect that a certificate binds the immoveable property of the debtor, and may be enforced as a decree only after service of the notice mentioned in s. 10. And there is every reason why that should be

(1) 23 C. 775.

(2) 1 C.W.N. 516.

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so, because the certificate is altogether an *ex parte* document; it only professes to certify that a certain debt is due and it is only by the service of the notice under s. 10 that the party against whom the debt is certified to be due becomes aware of the existence of the certificate.

Then as for s. 20 all that that section enacts is, that where a certificate is set aside by a competent Civil Court, the sale held in enforcement of the certificate shall also be set aside. But that does not prove that a sale of immoveable property held in enforcement of a certificate can be set aside only when the certificate is set aside. For there may be a class of cases and an important class, of which the present is an instance, and of which the cases of *Baijnath Sahai* v. *Ramgut Singh* (1), and *Saroda Charan* v. *Kista Mohun* (2) are also instances in which a certificate [704] may be made, and yet no notice given of it to the debtor as required by s. 10 of the Act, and, in any such case, if the property of the debtor is sold before he had any notice of the certificate against him, he may well say, "although the debt is due and has not been paid off, and although, therefore, I am not in a position to have the certificate cancelled, yet I am entitled to have the sale of my property, held under such a certificate, cancelled for the simple reason that I never had any notice of the certificate, my creditor having no power under the Act, unless he complies with its provisions, to sell my property to realise his dues." It is only after the notice under s. 10 is issued that the certificate acquires the force and effect of a decree which may be enforced and satisfied by the sale of the debtor's property.

It was lastly contended by the learned Senior Government Pleader that where a sale has been held in enforcement of a certificate, then, if the debtor is not in a position to have the certificate set aside, his proper remedy is to apply to the Commissioner for setting aside the sale. That may be so where the only ground for setting aside the sale is irregularity in publishing or conducting it. But where what is impugned is the authority of the Collector to hold the sale on the ground of their being no valid warrant for the sale in the form of a perfected certificate that is a certificate perfected by the issue of a notice under s. 10, which alone can give it the force of a decree, there, although there may be no irregularity in the publication or the conduct of the sale, the sale should be set aside as having been made altogether without authority, and there the right of bringing a civil suit is not in my opinion taken away by any of the provisions of the Public Demands' Recovery Act. The view I take is, as I have said above, supported by the cases of *Baijnath Sahai* v. *Ramgut Singh* (1), and *Saroda Charan* v. *Kista Mohun* (2).

S. C. G. *Appeal allowed, case remanded,*

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(1) 23 C. 775. (2) 1 C.W.N. 516.

27 C. 705=4 C.W.N. 699.

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[705] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

SOMESH (*Judgment-debtor*) *v.* RAM KRISHNA CHOWDHRY (*Decree-holder*).* [26th April, 1900.]

Transfer of Property Act (IV of 1882), *ss.* 86 *and* 87—*Order for possession absolute—Order for foreclosure absolute—Mortgagor's right to apply for extension of time, before an order for foreclosure absolute—Redemption of mortgage before order absolute.*

Until an order for foreclosure absolute in proper form is made under s. 87 of the Transfer of Property Act, the mortgagor can, upon a proper application, redeem the mortgaged property.

Poresh Nath Majumdar v. *Ramjadu Majumdar* (1) and *Narayana Reddi* v. *Papayya* (2) referred to.

[Diss., 3 N.L.R. 146 (154); F., 25 A. 231 (233); 3 C.L.J. 533 (536); 18 Ind. Cas. 357 (358); R., 7 A.L.J. 953 (956)=7 Ind. Cas. 50; 3 Bur.L.T. 2=8 Ind. Cas. 592 (593); 25 Ind. Cas. 752; 2 N.L.R. 137.]

THIS appeal arose out of an application for redemption of a mortgage. A preliminary decree for foreclosure was made in accordance with the provisions of s. 86 of the Transfer of Property Act on the 26th May 1898. On an application by the mortgagee (decree-holder) on the 26th January 1899 the following order was passed : "As the judgment-debtor has not paid the decretal amount within the time fixed the order for sale of the mortgaged property is hereby made absolute." It did not appear from the application that the mortgagor asked the Court to postpone the date appointed for payment, or that the mortgagor was served with a notice of this application. On the 8th March 1899 the judgment-debtor deposited the decretal amount in Court and the Court accepted the money. On the 26th April 1899 the decree-holder made an application to the Court which was in effect to amend the order of the 26th January 1899. The Munsif allowed the amendment and passed the following order—

"It appears that the order by which the decree has been made absolute was erroneously recorded. The order should have been for possession and not for sale, as the suit was for foreclosure and not for sale. Let the error, which [706] is only a clerical one, be amended in the original record which should be called for, the judgment-debtor cannot take advantage of the error on the order making the decree absolute. Objection disallowed. Let the execution case proceed."

On appeal to the District Judge the order of the lower Court was confirmed. Against this decision the judgment-debtor appealed to the High Court.

Babu *Shyama Prosonno Mazumdar*, for the appellant.—There was no order in this case that the mortgagor was absolutely debarred from redeeming the property mortgaged. The only order passed was in effect for possession absolute. That would not prevent the judgment-debtor from depositing the decretal amount after the time fixed by the decree, and

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* Appeal from Order No. 323 of 1899, against the order of F. F. Handley, Esq., District Judge of 24-Pergunnahs, dated the 8th of July 1899, confirming the order of Babu Bepin Chunder Chatterjee, Munsif of Diamond Harbour, dated the 26th of April 1899.

(1) 16 C. 246. (2) 22 M. 133.

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redeeming his property. Section 87 of the Transfer of Property Act provides for an order for foreclosure absolute. It also provides that the Court may extend the time for redemption on sufficient cause being shewn by the judgment-debtor. It does not appear in this case that the judgment-debtor was allowed an opportunity to redeem. Until an order absolute for foreclosure is obtained the judgment-debtor is not debarred from redeeming the mortgaged property. See the cases of *Narayana Reddi* v. *Papaya* (1) and *Poresh Nath Majumdar* v. *Ramjadu Majumdar* (2). There was no such order obtained in this case. When the mistake was rectified the order of the 26th April could not have a retrospective effect. Before an order for foreclosure absolute was made the judgment-debtor deposited the decretal amount, therefore he was entitled to redeem the properties.

Babu *Narendra Chundra Bose*, for the respondent.—The mistake being only a clerical one it was properly amended, and the amendment should be taken to have a retrospective effect. By looking at s. 60 of the Transfer of Property Act it appears that the mortgagor can deposit the mortgage debt in Court only before the suit is instituted, and after it is instituted he cannot do so. He does not remain a mortgagor then, but he becomes a judgment-debtor. By s. 86 of the Transfer of Property Act, on the expiry of the period of grace, the right of redemption [707] is extinguished. Therefore in this case the right of redemption did not exist on the date that the money was deposited.

Babu *Shyama Prosonno Mazumdar* in reply.

The judgment of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows :—

JUDGMENT.

MACLEAN, C.J.—This appeal must be allowed. The question arises in a suit to enforce a mortgage. On the 26th of May 1898, a preliminary decree for foreclosure was made and we are told, for we have not seen the decree itself, that in terms it followed the provisions of s. 86 of the Transfer of Property Act. There was an appeal from that decree, but the decree was confirmed on the 13th August 1898. Nothing turns upon that appeal. On the 6th January 1899, upon an application made by the mortgagee, the following order was made, "as the judgment-debtor has not paid the decretal amount within the time fixed, the order for sale of the mortgaged property is hereby made absolute." In point of fact there had been no order for sale. There is nothing to show whether or not, on that application, the mortgagor asked the Court to postpone the day appointed for payment. Whether the mortgagor was served with this application, or what were the actual terms of the application, does not appear. It will be noticed that the order was not that the defendant do stand debarred of all right to redeem the said mortgaged premises in accordance with the form of decree in sch. IV of the Code of Civil Procedure. After that order was made, the judgment-debtor, on the 8th March 1899, deposited the mortgage money in Court and the Court accepted the money. How this was done does not appear. It is not suggested that the amount deposited was insufficient. On the 26th April 1899 an application was made by the mortgagee in effect to amend the order of the 6th January 1899, upon the footing that it was made under some mistake; and the Court seems to have taken that view, and treating the expression "order for sale," occurring in the order

(1) 22 M. 133. (2) 16 C. 246.

1900 APRIL 26. — APPELLATE CIVIL. — 27 C. 705 = 4 C.W.N. 699.

of the 6th January 1899, as if it ought to have been "order for possession" held that there had been a clerical error only, and that the judgment-debtor could not take advantage of that error, and directed that the order as amended on the 26th April should relate back to, and be treated [708] as having been made on the 6th January 1899. There was an appeal from the order of the 26th April 1899 to the District Judge, and he, on the 8th July in the same year, confirmed the decision. Hence the present appeal.

The question we have to decide is whether, having regard to the language of the order of the 6th January 1899, and to the provisions of ss. 84 and 87 of the Transfer of Property Act, inasmuch as the mortgagor in the interval between the 6th January and the 26th April, paid the mortgage money into Court, and the Court accepted the money, the mortgagee is now entitled to treat the mortgage as absolutely foreclosed. I think not. Apart from the question of whether there was any mistake in the drawing up of the order of the 6th January 1899, and if there was that mistake, whether the order of the 26th April ought to have the retrospective effect given to it by the lower Courts when the mortgage money in the interval had been paid into Court, the authorities appear to me to establish, and I think rightly,—I allude to the cases of *Poresh Nath Majumder v. Ramjadu Majumdar*(1) and *Narayana Reddi v. Papayya* (2)—that until an order for foreclosure absolute has been made under s. 87 of the Act, the mortgagor may be allowed, upon a proper application, to redeem the mortgaged property. These decisions are consistent with the old practice in Chancery in England, and with the present practice in the Chancery Division of the High Court in England, and it is, I think, reasonably clear that ss. 86 and 87 of the Transfer of Property Act are modelled on that practice and view of the law, or, perhaps I should say, recognized principles of equity. Now, whether or not, the Court was right on the 26th April in saying that there was a mistake in the terms of the order of January 6th, 1899, and that, when the mistake was rectified, the order of April 26th had the retrospective effect, I have mentioned, I do not think it can be said to be an order for foreclosure absolute, so as to debar the mortgagor from the opportunity of redeeming the mortgaged property. The order of the 6th January, as amended by that of the 26th April [709] 1899, was one for possession being made absolute; it says nothing about the right of redemption being barred; and it was not in conformity, as I have pointed out, with the form given in sch. IV of the Code of Civil Procedure, nor with the language of s. 87 of the Transfer of Property Act. It may be said that an order for possession absolute is inconsistent with the idea of any right to redeem still subsisting, and there is perhaps some force in that view, but the mortgagor may retort that the mortgagee elected to take an order only for possession absolute, and did not ask for an order of foreclosure absolute, as he might have done, and that, until he has obtained an order for foreclosure absolute, the mortgagor is not absolutely barred from redeeming. I am, further, by no means satisfied that the order of the 26th April could be regarded as retrospective to the prejudice of the mortgagor, who, in the meantime, had paid in the mortgage money, and, if this view be well founded,—it is not necessary for me to express a final opinion upon it—the respondent's case would fail on this ground too.

(1) 16 C. 246. (2) 22 M. 133.

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Upon these grounds, I think that the order of the Court below must be discharged with costs. It must be taken that the payment into Court by the mortgagor, on the 8th of March, the sufficiency in amount not being disputed, was a good payment, and that the mortgage must be taken to be satisfied and the mortgagor must be restored to possession.

BANERJEE, J.—I am of the same opinion.

S. C. G. *Appeal allowed.*

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27 C. 709 = 4 C.W.N. 681.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

SARIATOOLLA MOLLA (*Judgment-debtor*) *v.* RAJ KUMAR ROY AND ANOTHER (*Decree-holder*).* [3rd April, 1900.]

Execution of decree—Step in aid of execution—Limitation Act (XV of 1877), sch. II., art. 179, *cl.* (4)—*Application by the decree-holder to be put in possession of property which he purchased in execution of his decree.*

[710] An application by a decree-holder to be put in possession of the property which he purchased in execution of his decree, is a step in aid of execution of that decree within the meaning of cl. (4), sch. ii, art. 179 of the Limitation Act. *Moti Lal* v. *Makund Singh* (1) followed.

[F., 35 B. 452 (460) = 13 Bom. L.R. 661 = 11 Ind. Cas. 987; 18 P.R. 1904; 18 C.W.N. 27 = 20 Ind. Cas. 874; R., 24 M. 185 (188); 25 M 529 (532); 31 A. 82 = 6 A. L J. 71 (82) = 5 M.L.T. 185; 11 C.L.J. 357 (360) = 14 C.W.N. 433 = 5 Ind. Cas. 89; 8 C.W N. 382 (384); 8 O.C. 161 (166); 13 C.W.N. 694 = 1 Ind. Cas. 430; 20 C.L.J. 433 = 25 Ind. Cas. 267; D., 3 C.L.J. 95 = 10 C.W.N. 28.]

THIS appeal arose out of an application for execution of a decree, dated the 12th May 1888. The application was made on the 6th August 1898. Previous to this application several other applications for execution were made, and amongst them one was made on the 16th October 1893, and the other on the 20th September 1897. The result of the application of the 16th October 1893 was, that certain immoveable properties of the judgment-debtor were sold and purchased by the decree-holders. That application was eventually dismissed by the Court on the 22nd September 1894. On the 20th July 1895 the decree-holders applied to be put in possession of the properties purchased by them. The application of the 20th September 1897 was also dismissed on the 13th November 1897, the decree-holders not having taken any step in aid of the execution. The defence of the judgment-debtor was that the application of the 20th September 1897 when made, was barred by limitation, therefore the present application was also barred by limitation. The Court of first instance dismissed the application holding that it was so barred. On appeal the District Judge reversed the decision of the first Court, on the ground that the application made by the decree-holders on the 20th July 1895, to be put in possession of the properties purchased by them was a

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* Appeal from Order No. 346 of 1899, against the order of B.C. Mitter, Esq., Officiating District Judge of Faridpur, dated the 1st of August 1899, reversing the order of Babu Akhoy Kumar Bose, Subordinate Judge of that District, dated 20th of March 1899.

(1) 19 A. 477.

step in aid of execution, therefore the present application for execution was within time.

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Against this decision, the judgment-debtor appealed to the High Court.

Babu *Sharoda Churn Mitter* for the appellant.—An application for delivery of possession of property purchased by the decree-holder could not be considered to be a step in aid of execution. As soon as the sale is confirmed, so far as that decree is concerned, it comes to an end, therefore it cannot be said that such an application is one to take some step in aid of the execution [711] of that decree. It is not necessary for the decree-holder to apply for delivery of possession. An application to receive poundage fee from the decree-holder has been considered to be not an application to take some step in aid of execution. See *Aghore Kali Debi* v. *Prosunno Coomar Banerjee* (1). As long as the poundage fee is not paid, and the Court does not accept it, nothing further in the way of execution could be done, still their Lordships held that an application to receive poundage fee was not a step in aid of execution. An application by the decree-holder to be allowed to set off the purchase money against the decree, instead of paying it into Court, is not a step in aid of execution. See *Ananda Mohan Roy* v. *Hara Sundari* (2) [C. J.—Here the application is to give effect to the sale, which is the result of the decree.] An application to take out of Court certain monies, the sale proceeds realized by the sales of certain properties of the judgment-debtor, is not a step in aid of execution of the decree. See *Fazal Imam* v. *Metta Singh* (3) and *Hem Chunder Chowdhry* v. *Brojo Soondury Debee* (4).

Babu *Brojendra Lal Mitter*, for the respondent, was not called upon.

The following judgments were delivered by the High Court (MACLEAN, C. J., and BANERJEE, J.).

JUDGMENTS.

MACLEAN, C. J.—The question we have to decide is a very short one, whether the application by the decree-holder of the 20th of July 1895 to be put into possession of the property which he had purchased under the execution proceedings is an application made in accordance with law to the proper Court to take some steps in aid of execution within the meaning of sub-s. 4 of art. 179 of the second schedule to the Limitation Act. If the question be answered in the affirmative the present application, of the 6th of August 1898, is admittedly not out of time, but, if it be answered in the negative, the present application is time barred.

[712] There is no authority, so far as we know, or so far as our attention has been directed, in the High Court of this province bearing directly upon the question. We have, it is true, been referred to various decisions, which lay down what does, and what does not in certain cases, and under the particular circumstances of those cases, constitute such an application. For my own part, however, inasmuch as each of those decisions depends upon the particular circumstances of the case, and the particular nature of the application which was made, I do not think that they afford a very useful guide to the present case.

There is a direct decision of the Allahabad High Court in the case of *Moti Lal* v. *Makund Singh* (5) that an application such as the present is within cl. 4 of art. 179 of the second schedule of the Limitation Act, as an

(1) 22 C. 827. (2) 23 C. 196. (3) 10 C. 549.
(4) 8 C. 89. (5) 19 A. 477.

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application to take some steps in aid of execution. That decision, it is true, is not binding upon this Court, but it is a decision which is entitled to every attention and to every respect at our hands, and it is one in which I agree with the conclusion arrived at. It is somewhat difficult to say that such an application, as we are considering, does not fall within the language of the statute read literally. It has not been disputed that the application was made to the proper Court and in the execution proceedings, and that, in those proceedings, the Court had power to make an order for possession.

The object of the application was to complete the matter; to complete, by giving possession, the purchase which the applicant had made. It is said that this was not a step in aid of execution, as upon the confirmation of the sale those execution proceedings came to an end. There was nothing more to be done. That is the argument. We are invited to read the expression 'execution' as applying, not to what has taken place, but only to that which is about to take or is in course of taking place. I am not disposed to put so narrow a construction upon the language of the article, and there are cases in this Court which tend to show that, in circumstances not so strong as the present, applications have been held to be applications to take a step in aid of execution, from which I infer that the Courts are disposed to place, and I think rightly, a somewhat broad and liberal construction upon **[713]** the article rather than a limited or confined one. Here it was a step in aid of execution, in the sense that it was a step to make that which had been done final and complete, and, in this sense, to aid the execution, which can hardly be said to have terminated, as, admittedly, the application was properly made in the execution proceedings, which must thus be regarded as still pending, and, if properly made in those proceedings, it is difficult to see, if it were not a step in aid of execution, what sort of a step it was, or what was its object.

Upon the best consideration, which I can give to the case, I think the application of the 20th July 1895 was such a step, and the appeal, consequently, must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. I think that, unless the contention that has been raised on behalf of the judgment debtor-appellant, can be pushed to this extent, that the words "applying in accordance with law to the proper Court to take some step in aid of execution of the decree" in cl. 4 of art. 179 of the second schedule of the Limitation Act, refer to the taking of some step in aid of execution in the future and not in aid of execution commenced and carried out in the past, an application like the one under consideration in this case, that is the application of the 4th of July 1895, must be held to be one coming within the clause of the article referred to above; and I am not prepared to hold that the words of the clause are used in the limited sense of referring only to steps in aid of execution to be had in the future. There is no case in point in this Court that we are aware of; and though some of the cases cited by the learned vakil for the appellant may lend some support to his contention, arguing by analogy, I feel bound to say with all deference to the learned Judges who decided those cases that I am unable to assent to the proposition therein laid down. But I do not think they stand in the way of our deciding the present case in the way we think it ought to be decided, or render it necessary for us to refer is to a Full Bench.

S. C. G. *Appeal dismissed.*

27 C. 714.

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[714] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.

SURNAMOYI DASI (*Defendant No.* 1) *v.* ASHUTOSH GOSWAMI AND OTHERS (*Plaintiffs*).* [23rd and 25th March and 18th April, 1900.]

Claim—Civil Procedure Code (*Act XIV of* 1882), *ss.* 278, 281 *and* 283—*Claim preferred by a defendant's predecessor-in-title—Claim disallowed but no suit brought within one year to set aside the order—Effect of such an adverse order as against the defendant, in a suit, and how far binding—Limitation Act* (*XV of* 1877), *sch. II, arts.* 11 *and* 15.

In a suit brought by the plaintiff to recover possession of certain lands by virtue of a purchase by his father, at an execution sale held by a Civil Court, it was found by the Court below that the vendor of the defendant had purchased the said lands at a sale held by a Deputy Collector for arrears of road cess, and had preferred a claim to the disputed property in the execution proceedings which led to the sale at which the plaintiff's father purchased, but which was disallowed, and no suit was brought by him (the defendant's vendor) within one year to set aside the order disallowing the claim.

Held, that the vendor of the defendant not having brought a suit within one year to set aside the order disallowing the claim, the defendant was concluded by that order, even if she was not the plaintiff in the suit, to establish her right to the property in dispute.

Nemagauda v. *Paresha* (1) referred to.

[R., 25 M. 721 (723) = 12 M.L.J. 411; 4 C.L.J. 334; 13 C.L.J. 404 = 16 C.W.N. 805 (810) = 10 Ind Cas. 90; 14 C.L.J. 620 (625) = 10 Ind. Cas. 417; D., 31 C. 228 (231); 1 N.L.R. 150 (151).]

THIS appeal arose out of an action brought by the plaintiffs to recover possession and mesne profits of certain rent-free lands. The allegation of the plaintiffs was that in June 1880 one Dwarka Nath Banerjee in execution of a decree against defendant No. 2 attached the disputed property, and on the 18th February 1882 the father of the plaintiffs purchased it in the *benami* of defendant No. 3, at a sale held in execution thereof; that the sale was confirmed on the 3rd June following; that on the 14th November 1882 their father died, and on the 15th February 1883 their mother took formal possession from the Civil Court of the said property; that on the 26th September 1883 their [715] mother executed an agreement to sell the said property to defendant No. 2 in the name of defendant No. 1, and it was agreed between the parties on receipt of a portion of the consideration money that the balance would have to be paid by the defendant within a year, failing which the agreement would be *null and void*; that by virtue of that agreement they relinquished possession of the property in favour of the defendants; that the defendants having failed to pay the balance of the consideration money within the stipulated time, they (the plaintiffs) were entitled to recover possession of the disputed property. The suit was brought on the 31st December 1894. The defence of defendant No. 1 was that the suit was barred by limitation; that the plaintiffs never had possession of the lands in dispute; that she never entered into an agreement with the plaintiff's

* Appeal from Appellate Decree No. 400 of 1898, against the decree of A. E. Staley, Esq., District Judge of Hooghly, dated 27th of November 1897, reversing the decree of Babu Kali Prasanna Mukerjee, Subordinate Judge of that District, dated the 21st of December 1896.

(1) 22 B. 640.

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mother to purchase the property; that the property in dispute was purchased by one Umesh Chunder Chatterjee, a pleader, on the 6th February 1882, at a sale held for arrears of road-cess, and from whom she purchased the said property.

It appeared from the evidence that on the 13th February 1882 Umesh preferred a claim in the Subordinate Judge's Court in the execution case of Dwarka Nath Banerjee. The Subordinate Judge disallowed the claim. Umesh did not bring any suit within a year to set aside the order disallowing the claim. On the 15th April 1882 Umesh got confirmation of the sale from the Deputy Collector, and on the 22nd of the same month he executed an agreement to sell the property to defendant No. 1, wife of defendant No. 2. On the 15th August 1882 Umesh took formal possession, and on the 25th April 1883 he executed a deed of sale in favour of defendant No. 1, declaring her entitled to full right, and giving her possession from the date thereof. The Court of first instance dismissed the suit of the plaintiffs. On appeal the District Judge reversed the decision of the first Court, and decreed the plaintiffs' suit, holding that it was not barred by limitation; that the sale at which the vendor of defendant No. 1 purchased was ineffectual in transferring any property as it was not held by a competent authority; that Umesh Chunder Chatterjee having preferred a claim to the disputed property in the execution proceedings, which led to the [716] sale at which the plaintiff's father purchased and the claim having been disallowed, and no suit having been brought within one year, to set aside the order disallowing the claim, the defendant No. 1 was concluded by that order under s. 283 of the Civil Procedure Code.

Against this decision defendant No. 1 appealed to the High Court.

MARCH 23 and 25, 1900. The Advocate-General (Mr. *J. T. Woodroffe*) with him (Babu *Lal Mohun Das*, Babu *Dwarka Nath Chuckerbutty* and Dr. *Ashutosh Mookerjee*), for the appellant. The question in this case is what is the effect of a sale of a property under a certificate issued for arrears of road-cess, when that property was under attachment in execution of a decree of a Civil Court. The sale certificate was granted by a Deputy Collector.

Arrears of road-cess is a public demand. Collector has been defined in the Public Demands Recovery Act (Bengal Act VII of 1880), and the question is whether a Deputy Collector in charge of road-cess comes within the definition of Collector. By Act I of 1891 (B. C.) all certificates issued by a Deputy Collector prior to this Act have been validated.

[BANERJEE, J.—Still the question remains whether the certificate issued by the Deputy Collector was in the capacity of a Collector as defined in s. 4, Act VII of 1880 (B. C.).]

Effect of a sale of a property by an inferior Court, while that property has already been sold in execution of a decree of a superior Court, has been considered in the case of *Bykant Nath Shaha* v. *Rajendro Narain Rai*(1), following the case of *Obhoy Churn Coondoo* v. *Golam Ali*(2). Their Lordships held, if the sale by the inferior Court was a good sale, the mere fact that the property was previously sold at a sale held in execution of a decree of a superior Court would not have the precedence over the sale by the inferior Court. See also the cases of *Ram Narain* [717] *Singh* v. *Mina Koery* (3), *Abdul Karim* v. *Thakordas Tribhovandas* (4), *Patel Naraonji Morarji* v. *Haridas Navalram*(5). Section 285 of the Code of Civil

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(1) 12 C. 333. (2) 7 C. 410. (3) 25 C. 46.
(4) 22 B. 88 (93). (5) 18 B. 458.

Procedure is merely a section for procedure to prevent different claims arising out of the attachment and sale of the same property by a different Court. It has been held in the case of *Kashy Nath Roy Chowdhry* v. *Surbanund Shaha* (1) that when a property is sold in execution of a decree it cannot be sold again at the instance of another decree-holder, who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold, and when a judicial sale takes place all previous attachments effected upon the property sold fall to the ground. Therefore conceding that the Court of the Collector was lower than that of the Subordinate Judge, the sale being good, and no attachment subsisting when the sale in execution of the Subordinate Judge's decree took place, the latter sale could not have precedence over the sale held under the certificate. The Court below ought to have held that the suit of the plaintiffs was barred by limitation, inasmuch as they were not in possession within twelve years from the date of the suit. The possession obtained by the plaintiffs in February 1883 was symbolical possession and not actual possession, and thus could not save the suit from being barred by limitation. It could not affect defendant No. 1, who was not a party to the execution proceedings. See the cases of *Joggobundhu Mitter* v. *Purmanund Gossami* (2), *Runjit Singh* v. *Bunwari Lal Sahu* (3). The Court below was wrong in holding that, inasmuch as there was an adverse order in the claim case against the vendor of the defendant, and as no suit was brought within one year to set aside that order, the defendant was debarred from defending the suit: see *Gend Lall Tewari* v. *Denonath Ram Tewari* (4). That order could not affect the appellant, because he is not the plaintiff in any suit to establish her right to the [718] property in dispute, and also because the order was made without any investigation of possession as s. 278 of the Code of Civil Procedure requires: see *Kallar Singh* v. *Toril Mahton*. (5)

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MARCH 25, 1900. Sir *Griffith Evans* (with him Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit*), for the respondents.—There is no presumption in favour of a proceeding of this kind, the formalities required by Act VII of 1880 (B. C.) should be strictly complied with. The particulars mentioned in ss. 7 and 10 of the Act should be certified by the hand of the proper officer appointed by the Act for the purpose. If no such certificate is given then the whole basis of the proceeding is gone. See the cases of *Baijnath Sahai* v. *Ramgut Singh* (6), *Mahomed Abdul Hai* v. *Guraj Sahai* (7). The defendant's vendor not having instituted a suit within one year to set aside the order disallowing the claim, the defendant was concluded by that order under s. 283 of the Civil Procedure Code. See the case of *Nemagauda* v. *Paresha* (8). The order was passed after investigation. The extent to which the investigation required by s. 280 of the Civil Procedure Code should be carried depends upon the circumstances of the case. See *Sardhari Lal* v. *Ambika Pershad* (9).

MARCH 25, 1900. Mr. *Woodroffe* in reply.

Cur. adv. vult.

APRIL 18, 1900. The judgment of the High Court (MACLEAN, C. J., and BANERJEE, J.) was as follows:—

JUDGMENT.

MACLEAN, C. J.—This appeal arises out of a suit brought by the plaintiff-respondents, to recover possession and mesne profits of certain

(1) 12 C. 317. (2) 16 C. 530. (3) 10 C. 993.
(4) 11 C. 673 (677). (5) 1 C.W.N. 24. (6) 23 C. 775 (786).
(7) 24 C. 826 (829). (8) 22 B. 640 (643). (9) 15 C. 521 (525)=15 I.A. 123.

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rent-free lands. Their case is that, at a sale in execution of a decree against defendant No. 2, the former owner of those lands, the plaintiff's father purchased the same for Rs. 3,850 on the 18th of February 1882, *benami*, in the name of defendant No. 3 (nothing for present purposes turns upon this); that the sale was confirmed on the 3rd of June following; that the plaintiff's father having died shortly after, the plaintiffs [719] obtained symbolical possession of those on the 15th of February 1883; that, subsequently, the defendant No. 2, and his wife the defendant No. 1 having entered into an agreement with the mother and guardian of the plaintiffs for the purchase of the lands, the plaintiffs relinquished possession in their favour, and that the defendants Nos. 1 and 2 not having paid the consideration money in full, within the time stipulated, the plaintiffs became entitled, under the terms of the agreement, to recover possession of the property.

The defendant No. 1, who alone contested the suit, says, on the other hand, that the plaintiffs never had possession of the property in dispute, that their suit is barred by limitation; that the answering defendant never entered into any agreement with the plaintiff's mother for the purchase of the property, and that the land in dispute was purchased on the 6th of February 1882, at a sale for arrears of road cess by Umesh Chunder Chattopadhya, a pleader, from whom the answering defendant purchased the same out of her *stridhan*.

The first Court, whilst finding in favour of the auction purchase set up by the plaintiffs, held that their suit was barred by limitation, and, as prior to their purchase, the property had been purchased on the 6th February 1882, at a sale for arrears of road cess by Umesh Chunder Chattopadhya, who subsequently sold it to defendant No. 1—it also found that the agreement set up by the plaintiffs was not binding on defendant No. 1.

On appeal by the plaintiffs the lower appellate Court has reversed the decision of the first Court and given the plaintiffs a decree, holding that their suit was not barred by limitation, that the sale at which the vendor of defendant No. 1 purchased was ineffectual in transferring any property, as it was not held by a competent authority, and that Umesh Chunder Chattopadhya having preferred a claim to the property in dispute in the execution proceedings, which led to the sale at which the plaintiff's father purchased, and such claim having been disallowed, and no suit being brought within one year to set aside the order disallowing the claim, the defendant No. 1 is concluded by the order under s. 283 of the Code of Civil Procedure.

[720] Against that decree the defendant No. 1 has preferred this second appeal. The learned Advocate-General on her behalf contends that all the grounds for the decision of the lower appellate Court are wrong, while, on the other hand, the learned counsel for the plaintiff-respondents urges, not only that those grounds are well founded, but that the Court of appeal below ought to have held that, in the absence of any certificate under the Public Demands Recovery Act VII of 1880 (B. C.) being shewn to have been filed and duly notified to the debtor, the sale to Umesh ought not to be, and cannot be regarded as a valid one, and further that the purchase by Umesh was really *benami* for the judgment-debtor, and could not prevail over any subsequent sale in execution of a decree against him.

We may at once point out that, if the latter fact were substantiated, *viz.*, that the purchase by Umesh was *benami* for the judgment-debtor,

the other questions raised would not arise. And, although this question, which is an important one, has been touched upon in the lower Court, no decision has been given upon it.

The points which, under these circumstances, now arise for determination are, *first*, whether the suit is barred by limitation; *second*, what is the effect of the order of the 9th of February 1882, disallowing the claim of Umesh; *third*, was the sale, at which Umesh Chandra Chattopadhya purchased, a valid sale, and *fourth*, if so, whether it is open to the respondents to raise the question of Umesh Chundra Chattopadhya's purchase being *benami* for the judgment-debtor, and, if it is so open to them, whether it was in fact a *benami* transaction.

Upon the first point it was argued by the learned Advocate-General for the appellant, that as the possession obtained by the plaintiffs in February 1883 was not actual but only symbolical possession, it could not affect the defendant No. 1, who was no party to the execution proceedings, and so save the suit from the bar of limitation; and in support of this argument the case of *Juggobundhu Mitter* v. *Purmanund Gossami* (1) was cited. If the symbolical possession obtained by the plaintiffs had not been followed by actual possession, this argument would no doubt have been [721] well founded, but the learned Judge in the lower appellate Court has found that the plaintiffs were in possession by placing two durwans in charge of the garden. He says: "I think the evidence of the respectable pleader, Babu Bhagwan Chundra Gossain, should be believed, when he says that the plaintiffs had two durwans in charge till October 1883. No more than this would naturally be done in the way of actual possession, when the land was occupied by tenants, and when the plaintiffs soon agreed to sell their rights." And he adds: "There is nothing to prove that Umesh had more than a formal delivery of possession without right, and he never did any act of possession." The learned Judge refers to other passages in the evidence as showing that the plaintiffs were in possession up to October 1883, and his finding, which is binding upon us on second appeal, must be taken as one to that effect. He sums up by finding there was no adverse possession until 1894. The suit was brought within 12 years from that date, and so it is not out of time.

Upon the second question it was contended for the defendant-appellant that the order of the 9th of February 1882, purporting to reject the claim of Umesh Chunder Chattopadhya, could not affect the appellant:—

First, because the appellant is not the plaintiff in any suit to establish her right to the property in dispute.

Secondly, because the order was made without any "investigation" into the claim.

Thirdly, because the application of Umesh was not a claim preferred under s. 278 of the Code of Civil Procedure, and s. 283 of the Code was consequently inapplicable to the case; and *lastly*, because the appellant was claiming under a title acquired by his vendor Umesh subsequent to the order of the 9th of February 1882.

In support of the first ground the case of *Gend Lall Tewari* v. *Deno Nath Ram Tewari* (2) is relied upon. But that case, apart from other grounds, upon which it may be distinguished from this case, was decided under the old law, s. 246 of Act VIII of 1859, the language of which was different from that of s. 283 [722] of the present Code. Section 246 of Act VIII of 1859 simply said: "The order which may be passed by the Court

(1) 16 C. 530. (2) 11 C. 673.

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under this section shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order" while s. 283 of the present Code enacts that "the party against whom an order under ss. 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive" and by art. 11 of the second schedule of the Limitation Act such suit must be brought within one year. The language of the two sections is thus substantially different. If then there was, in this case, an order under s. 281 of the Code rejecting the claim of Umesh, as we think there was, and as no suit was brought within one year to establish the right to the property in dispute which Umesh claimed, such order has by s. 283 become conclusive on the question of Umesh's right as between defendant No. 1 who claims title through Umesh, and the plaintiffs, who derive their title from the auction-purchaser at the execution sale, which followed the rejection of the claim of Umesh; and there is nothing in s. 283 to show that the conclusive effect referred to in it attaches to the order only when the party against whom it is made is plaintiff in the suit, in which it is set up as a bar. This view is in accordance with that taken by the Bombay High Court in *Nemagauda* v. *Paresha* (1).

In support of the second reason mentioned above, the case of *Kallar Sing* v. *Toril Mahton* (2) is relied upon as showing that where a claim is rejected without any investigation, s. 283 is inapplicable to it. That is undoubtedly so. But the order in the present case was made so far as one can judge from the materials before us after such investigation as the case admitted of, the extent of the investigation was, perhaps, not great, but then the facts of the case were apparently few and practically undisputed. That, as pointed out by the Privy Council in *Sardhari Lal* v. *Ambika Pershad* (3) is sufficient to make the order one under **[723]** s. 281, the Code not prescribing the extent to which the investigation should go.

In support of the third ground it was urged that the Court must look to the substance of the application and of the order, and not merely to their form and language. After carefully considering the petition and the order made upon it on the 9th February 1882, it is reasonably clear that in form as well as in substance the petition was one under s. 278, and the order one under s. 281 of the Code. Rightly or wrongly, the Court held that the alleged title of the then applicant created after attachment by numerous decree-holders could not prevail as against the latter, and relied upon the fact that the sale to the then applicant had not been confirmed ("is not yet *pukkha*"), and that he had not obtained possession of the property in question, and it further held that the sale was bad under s. 285 of the Code, and it accordingly rejected the claim. This may have been right or it may have been wrong, but as the then applicant did not choose to challenge the decision by regular suit within the year, the decision must be taken to be conclusive.

As to the last reason, it is enough to say that though the sale at which Umesh purchased was confirmed after the order of the 9th February 1882, the confirmation of the sale did not create any new right, but only perfected the inchoate right acquired at the sale, and that the Court rejected the claim not merely because the sale at which the claimant made

(1) 22 B. 640. (2) 1 C.W.N. 24. (3) 15 C. 521.

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his purchase had not been confirmed, but also because in the opinion of the Court it was a bad sale.

The effect then of the order of the 9th of February 1882 must, as we have already pointed out under s. 283 of the Code, be held to be conclusive as between the parties to this suit against the contention of defendant No. 1 that her vendor Umesh had a title to the property in dispute, which should prevail against that of the plaintiffs' under their father's purchase at the execution sale which followed the rejection of the claim of Umesh.

We have dealt, at perhaps greater length than was absolutely necessary, with the various contentions which were laid before us, [724] and we have done so by reason of the minuteness with which it was deemed necessary to present them to the Court; but, in our opinion, the case is a reasonably clear one, having regard to the provisions of the Code to which we have had occasion to refer.

In this view it becomes unnecessary to consider the third and fourth questions stated above. If it had been necessary, we should have held, upon the third question, that the ground upon which the lower appellate Court's judgment is based has been met by the production of the Civil List which shows that the Deputy Collector who held the sale was a duly authorized officer, but at the same time we should, for reasons into which it is unnecessary to enter, have thought it right to remand the case to the lower appellate Court to determine whether there had been a certificate duly filed and notified under Act VII of 1880 (B.C.), and upon the fourth question it might have been necessary to direct the Court below to determine whether the purchase by Umesh was not *benami* for defendant No. 2. But as we have observed above, it is unnecessary to say anything more on these two points.

The result then is that the appeal fails, and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

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APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Harington.

LALA SURJA PROSAD AND ANOTHER (*Plaintiffs*) v. GOLAB CHAND (*Defendant*).* [2nd, 5th and 6th March, and 7th May, 1900.]

Hindu Law—Mitakshara family—Liability of son to pay father's debt incurred during son's minority—Representative capacity of father—Antecedent debt—Mortgage—Suit for sale on mortgage by father, without joining sons—Non-joinder of parties—Transfer of Property Act (IV of 1882), s. 85—Notice of interest in mortgaged property—Multiplicity of suits—Civil Procedure Code (Act XIV of 1882), ss. 28, 42, 436, 437, 575.

In the case of a joint Mitakshara family consisting of a father and a minor son, where the father executed a mortgage bond hypothecating ancestral family property during the minority of his son, and the mortgagee with [725] notice of the interest of the son in the mortgaged property brought a suit against the father alone to enforce the mortgage, without making the son a party to the suit and obtained a decree declaring that the mortgaged property was liable to be sold

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*Appeal from Original Decree No. 397 of 1898, against the decree of Babu Jadupati Banerjee, Offg. Subordinate Judge of Sarun, dated the 24th of September 1898.

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in execution thereof, and where the debt was not proved to have been incurred for illegal or immoral purposes:

Held, *Per* GHOSE, J.—That the share of the son in the ancestral property was liable for the satisfaction of such decree, notwithstanding the provisions of s. 85 of the Transfer of Property Act (IV of 1882), the father having incurred the debt in his representative capacity and as managing member of the family, and the son having been substantially a party to the suit in which the said decree was passed, through the representation of his father:

Section 85 of the Transfer of Property Act lays down only a rule of procedure; and the words "all persons" in the section could have hardly been intended to include a Mitakshara son—much less a minor son, in a suit where the father is sued in his representative capacity.

Suraj Bansi Koer v. *SheoPershad Singh* (1), *Bissessur Lal Sahoo* v. *Maharajah Luchmessur Singh* (2), *Nanomi Babuasin* v. *Modun Mohun* (3), *Daulat Ram* v. *Mehr Chand* (4), *Pursid Narain Singh* v. *Honooman Sahai* (5), *Bhagbut Pershad* v. *Girja Koer* (6), *Mohabir Prosad* v. *Maheshwar Nath Sahai* (7), *Jagabhai Lalubhai* v. *Vijbhukan Das* (8), relied on.

Bhawani Prasad v. *Kallu* (9), dissented from.

Syud Emam Momtazuddin Mahomed v. *Raj Coomar Dass* (10), *Ramasamayyan* v. *Virasami Ayyar* (11), *Palani Goundan* v. *Rangayya Goundan* (12), referred to.

Semble.—(*a*). In the case of a joint Mitakshara family consisting of a father and minor sons, the father is "necessarily" the manager of the joint family and as such, for all purposes, is the representative of the family:

[726] (*b*). And where the father, the managing member, mortgages family property for an antecedent debt, and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him in his representative capacity:

(*c*). And that if a son, after a decree being obtained against the father upon a mortgage executed by the latter, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution thereof sues to recover possession of his share, he cannot succeed unless he proves that the debt was contracted for an immoral or illegal purpose, or that it was of an illusory character.

Per HARINGTON, J.—That having regard to the provisions of s. 85 of the Transfer of Property Act and those of ss. 28 and 42 of the Civil Procedure Code, the mortgagee was bound to make the plaintiff (the son) a party to the mortgage suit; and that, not having done so, he was not entitled to obtain a decree affecting the plaintiff's interest in the mortgaged property.

Bhawani Prasad v. *Kallu* (9), followed.

Rothschild v. *Commissioners of Inland Revenue*(13), *Ramasamayyan* v. *Virasami Ayyar*(11), *Palani Goundan* v. *Rangayya Goundan*(12), referred to.

[Appr., 17 O.C. 318 = 25 Ind. Cas. 917 (920); **R.**, 34 A. 549 (565) = 9 A.L.J. 819 = 15 Ind. Cas. 126; 26 B. 163 (169); 34 B. 354 (357) = 12 Bom.L.R. 219 = 5 Ind. Cas. 967; 27 C. 762 (766); 34 C. 642 (645) (**F.B**) = 5 C.L.J. 491 = 11 C.W.N. 593 = 2 M.L.T. 207; 34 C. 735 = 5 C.L.J. 569 = 11 C.W.N. 613; 3 Bom.L.R 322; 3 Bom. L.R. 647; 16 C.P.L.R. 19 (22); 18 Ind. Cas. 848 (850) = 9 N.L.R. 1; 41 C. 727 = 19 C.L.J. 437 = 22 Ind. Cas. 570.**]**

THE plaintiffs No. 1 and No. 2 are the minor son and the widow of one Chunder Koilash Saran *alias* Lachhanji who died on the 23rd July 1894.

Lachhanji on attaining his majority in 1890, borrowed from time to time various sums of money from the defendant Golab Chand, on mortgage, hypothecating ancestral property for the purpose of meeting certain alleged

(1) 5 C. 148 = 6 I.A. 88.
(2) 6 I.A. 233 = 5 C.L.R. 477.
(3) 13 C. 21 = 13 I.A. 1.
(4) 15 C. 70 = 14 I.A. 187
(5) 5 C. 845.
(6) 15 C. 717 = 15 I.A. 99.
(7) 17 C. 584 = 17 I.A. 11.
(8) 11 B. 37.
(9) 17 A. 537.
(10) 14 B.L.R. 408.
(11) 21 M. 222.
(12) 22 M. 207.
(13) (1894) 2 Q.B. 142 (145).

necessities of his family of which he was the head, and which was governed by the Law of Mitakshara. 1900 MAY 7.

On the 4th April 1893 Lachhanji executed a mortgage-bond for Rs. 6,900 in favour of the defendant, while his son (the plaintiff No. 1) was a minor, promising to repay the amount with interest on the 27th August 1893. The alleged purpose for which this liability was incurred was to satisfy certain previous debts, and the decretal amounts due to one Ram Bux Mull and Santa Persad as recited in the said mortgage-bond. APPELLATE CIVIL. 27 C. 724 = 4 C.W.N. 701.

[727] On the 31st August 1893 the defendant instituted a suit against Lachhanji on the mortgage bond of the 4th of April 1893 without making the plaintiff No. 1, a party to the suit though the defendant had notice of his (the son's) interest in the mortgaged property, and obtained a decree on the 3rd of October 1893 declaring that the mortgaged property was liable to be sold in execution thereof. This decree was made absolute on the 28th February 1894. It was not proved that the debt incurred by Lachhanji under the mortgage of the 4th of April 1893 was for any illegal or immoral purpose.

On the 28th of September 1893 the plaintiffs instituted a suit against Lachhanji for partition of the ancestral property on the allegation that he was wasting the property through reckless extravagance and debauchery, and had their shares partitioned on the 12th of March 1894.

After the death of Lachhanji, the defendant applied, on the 3rd of September 1894, for execution of the mortgage decree as aforesaid against the plaintiff No. 1 as representative and heir of the deceased judgment-debtor, Lachhanji. The plaintiff objected to this, but his objection was overruled, and he was referred to a regular suit.

The plaintiffs accordingly instituted this suit mainly on the following grounds:—

1. That because the plaintiffs were not made parties to the suit on the mortgage-bond of the 4th of April 1893, the defendant having notice of their interest in the mortgaged property, their shares in the ancestral estate could not be made liable for the satisfaction of the debt.

2. That the debt was contracted by Lachhanji for illegal and immoral purposes, and therefore the shares of the plaintiffs could not be taken in execution of the decree obtained by the creditor (defendant).

3. That the ancestral property having been partitioned, the plaintiffs' shares in the property could not be attached in execution of the said decree.

The defendant pleaded that the mortgage was executed, and **[728]** the decree obtained thereon during the minority of the son (plaintiff No. 1) when the father was the manager and *kurta* of the family, the decree was therefore binding on the son; that the plaintiff No. 2 (the widow) had no right in the family ancestral property; that the debt was incurred for necessary expenses of the family, and not for immoral or illegal purposes; and that the decree for partition relied on by the plaintiffs could not be binding on the defendant, as he was not made a party to the suit for partition, although it was instituted after his suit on the mortgage and that the suit for partition was a collusive one.

The Subordinate Judge held that though there was some evidence of general extravagance and immorality on the part of the father, yet there was no proof that the money raised on the mortgage was applied to immoral or illegal purposes; that the whole amount covered by the bond of the 4th April 1893 should be regarded as an antecedent debt; and that there being a pious duty on the part of the son to pay his father's debts

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the plaintiffs were not entitled to succeed; and that the decree for partition was not binding on the creditor (defendant), and he accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

MARCH 2, 5, 6, 1900. Dr. *Rash Behary Ghose*, Babu *Karuna Sindhu Mukerji*, Babu *Akshoy Kumar Banerjee* and Babu *Surendra Nath Gosal*, for the appellants. Under the provisions of s. 85 of the Transfer of Property Act, the son (plaintiff No. 1) should have been made a party to the suit on a mortgage which the defendant instituted in August 1893, against the father, having notice of the son's interest in the mortgaged property. The defendant having omitted to do so, the mortgage decree obtained on the 28th February 1894 against the father alone is inoperative as against the share of the son in the property mortgaged by the father: see *Bhawani Prasad* v. *Kallu* (1).

The father, in a joint Mitakshara family, cannot be regarded for the purposes of a mortgage suit, as the representative, even of [729] his minor sons. A mortgage decree obtained in the absence of a party interested in the property mortgaged cannot affect his interests in the property: *Momtazuddin Mahomed* v. *Raj Coomar Dass* (2). The father when sued alone could not be regarded as sued in his representative capacity, because the defence of the father would not be the same as that of the son. And besides, it was the intention of the Legislature to discourage, by the provisions of s. 85 of the Transfer of Property Act, multiplicity of suits; and therefore the creditor having notice of the interest of the son in the property mortgaged, is bound to make him a party when suing to enforce the mortgage bond executed by the father. And in this case the mortgagee has wilfully disregarded the law by not making the son a party.

The income derived from the ancestral estate being sufficient to meet all legitimate expenses of the family, the money raised on the mortgage must have been applied to immoral purposes by Lachhanji, who led a dissipated life. And considering that Lachhanji, soon after attaining his majority, began contracting debts by executing several bonds at short intervals, such transactions should be regarded as unconscionable, because the lender must have taken undue advantage of Lachhanji's youth and indiscretion.

The plaintiffs had obtained a decree for partition against Lachhanji and an actual partition having been made, the defendant could not enforce the mortgage security given by Lachhanji against the property allotted to the plaintiffs on such partition.

Babu *Golap Chandra Sarkar* and Babu *Dwarka Nath Mitter*, for the respondent.—Section 85 of the Transfer of Property Act does not lay down any new rule of procedure, but embodies a rule which was well recognized before the passing of the Act (See Dr. Rash Behary Ghose's Mortgage, 2nd edition, pp. 137, 138).

The case of *Bhawani Prasad* v. *Kallu* (1) relied on by the [730] other side, has been dissented from by the Madras High Court in the case of *Ramasamayyan* v. *Virasami Ayyar* (3), and in *Palani Goundan* v. *Rangayya Goundan* (4).

In a Mitakshara joint family one member may represent the whole family in transactions with outsiders, and may be sued in his representative capacity; so a decree against him alone, and the proceedings including the sale of family property in execution thereof, are binding on all the

(1) 17 A. 537. (2) 14 B.L.R. 408. (3) 21 M. 222. (4) 22 M. 207.

members of the family, though they were not made parties to the said suit or proceedings,—specially when the father is the manager and the other members are his minor sons. It was repeatedly held that the managing member of a joint Mitakshara family represented the other members of the family in all transactions and suits, or proceedings against him alone. See *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), *Luchman Dass* v. *Giridhur Chowdhry* (2), *Nanomi Babuasin* v. *Modun Mohun* (3), *Dawlat Rum* v. *Mehr Chand* (4), *Mahabir Persad* v. *Moheshwar Nath Sahai* (5), *Minakshi Nayudu* v. *Immudi Kanaka Ramayya Goundan* (6).

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JUDGMENTS.

MAY 7, 1900. GHOSE, J.—This appeal arises out of a suit by a Mitakshara son, a minor, and his step-mother, the object of the suit being to have it declared that, in execution of a mortgage decree obtained by the creditor, the defendant, against the father, the shares of the plaintiffs in the ancestral property could not be made liable for the satisfaction of such decree. The Court below has dismissed the suit, and hence this appeal by the plaintiffs.

It appears that Lala Chandra Koylas Saran *alias* Lachhanji, **[731]** father of the minor plaintiff, and the husband of the other plaintiff, was the son of one Lalla Chamroo Lall. The latter died in the year 1875 or 1876. At that time Lachhanji was a minor, and his mother, Mussamut Tapeswar Koer, was appointed his guardian by an order of the District Judge of the 20th November 1876. In November 1890, Lachhanji arrived at majority, and took over charge of the estate left by his father. On the 12th of February 1891, he executed a mortgage bond in favour of Golab Chand, defendant No. 1 and Lall Chand, for the sum of rupees five thousand, it being stated in the bond that the money was required for the purpose of instituting a suit upon a certain *ekrarnamah*, and for meeting his own marriage and other necessary expenses. It would appear that during his minority, Lachhanji had been married, and a son was born to him, who is the plaintiff No. 1; but he lost his wife; and it is said that the marriage expenses referred to in this bond related to a second marriage which he was then about to contract. On the 10th of August 1891, he borrowed rupees eight hundred from Golab Chand upon a bond on account of a certain alleged necessity; and this was followed by a mortgage bond, dated the 9th October 1891, for rupees three thousand in favour of the same individual. This amount included the sum of rupees eight hundred covered by the bond of the 10th August 1891, the necessity recited in this mortgage bond being (so far as the amount then received was concerned) the payment of certain petty debts due to certain individuals. On the 1st of May 1892, Lachhanji executed another mortgage bond for rupees fifteen hundred to Golab Chand, the necessity mentioned in this bond being the payment of *putni* rent due in respect of a certain taluk, the interest due upon the mortgage bond of the 9th of October 1891, and other necessary expenses. On the 4th of April 1893, he executed another mortgage bond for Rs. 6,900 to the same individual Golab Chand. This amount included the sum of Rs. 3,000 covered by the mortgage bond of the 9th of October 1891, and the interest due upon the mortgage bond of the 1st of May 1892, the necessity recited in this bond being (so far as the additional amount then received was concerned) the payment of two decrees due to

(1) 5 C. 148=6 I.A. 88. (2) 5 C. 855. (3) 13 C. 21=13 I.A. 1.
(4) 15 C. 70=14 I.A. 187. (5) 17 C. 584=17 I.A. 11. (6) 12 M. 142.

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Ram Bux Mull and Sant Prosad for Rs. 1,000 and Rs. 1,700 respectively, and certain petty debts **[732]** amounting to Rs. 1,146-12. A suit was instituted upon this last-mentioned bond, on the 31st of August 1893, against Lachhanji, and a mortgage decree was obtained on the 20th of February 1894. In the meantime, *i.e.*, on the 28th September 1893, the minor plaintiff, through his grandmother as guardian, instituted a suit against his father for a partition of the joint ancestral property. The creditor Golab Chand was not made a party to this suit, and a decree for partition was obtained on the 12th of March 1894. In the next year, that is to say on the 23rd July 1894, the father Lachhanji died; and when in September 1894 the decree-holder Golab Chand, defendant No. 1, applied for execution of his decree against the minor plaintiff as the legal representative and heir of his father, it was objected to on his behalf on the ground that the debts contracted by the father having been for illegal and immoral purposes, and he, the plaintiff, not having been made a party to the suit in which the decree was obtained, the family property could not be sold. This objection was overruled, the plaintiff being referred to a separate suit for the purpose of having such a question determined; and the present suit was accordingly instituted. The main grounds upon which the action is based are: *first*, that the plaintiffs having not been made parties to the suit instituted by the creditor Golab Chand upon the mortgage bond of the 4th of April 1893, the properties allotted to their share under the partition decree, could not be made liable; *secondly*, that the money covered by the said mortgage bond having been spent in immoral and illegal purposes, the shares of the plaintiffs could not be taken in execution of the decree obtained by the creditor; and *thirdly*, that a large portion of the money covered by the mortgage bond in question was deducted by the creditor on account of compensation, *salami*, &c. In answer to this, the creditor Golab Chand pleaded that the mortgage was given, and the decree obtained, at a time when the plaintiff No. 1 was a minor, and the father was the manager and *kurta* of the family, and therefore they were binding on him; that the other plaintiff had no right in the property; that the debt was incurred by the father for necessary purposes of the family, and not for any immoral purpose: that no portion of the money covered by the mortgage bond was deducted by way **[733]** of compensation and *salami*; and that the partition decree of the 12th of March 1894, relied upon by the plaintiffs, could not be binding upon him, and it was collusive.

The Subordinate Judge, in the course of his judgment in this case, has fully discussed the Mitakshara law on the subject, as expounded by the Privy Council, and by this Court in different cases, and has held that, though there is evidence in proof of general extravagance and immoral conduct on the part of the father Lachhanji, and though he would be inclined to infer from such evidence that the money borrowed by Lachhanji was used to satisfy his sensual habits, yet this is not sufficient, there being no proof that the money was actually applied to immoral purposes; that the whole of the debt covered by the bond of the 4th of April 1893 should be regarded as an antecedent debt *minus* a small amount of Rs. 180, which was twice charged as interest; and that there being a pious duty in the son to pay the debt of his father, the plaintiffs are not entitled to succeed. He has further held that the partition decree is not binding upon the creditor-defendant.

The first question that has been raised and discussed before us on behalf of the plaintiffs-appellants is whether, having regard to the provisions

of s. 85 of the Transfer of Property Act (IV of 1882), the mortgage decree obtained by the creditor Golab Chand on the 28th of February 1894 is operative and good in law, so as to affect the interest of the plaintiffs in the property mortgaged, by reason of the omission to include in the suit the minor plaintiff (the son) as a party defendant. That section runs as follows :—" Subject to the provisions of the Code of Civil Procedure, s. 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage; provided that the plaintiff has notice of such interest."

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In dealing with the question raised we have to consider, in the first instance, whether the creditor Golab Chand had notice of the interest of the son. It appears upon the evidence that Lal Chand and Golab Chand, who were related to each other as uncle and nephew, had a *kothi* which apparently was a joint *kothi* but they had also separate business of their own, at least, [734] so it is alleged. The uncle Lal Chand, however, being the *kurta* of the family, had everything under his control. Golab Chand swears that the money covered by the mortgage bond of the 4th April 1893 belonged to him exclusively, and that he was not aware at the time of the institution of the suit upon his mortgage that Lachhanji had a son, nor did he make any enquiry about it. It appears, however, from the evidence of the defendant's witness Chutto Lal, and who is his general agent, that he had been asked by Lal Chand to make enquiries before money was advanced by him to Lachhanji under the mortgage bond of the 12th February 1891, about the properties belonging to that individual, which were then proposed to be mortgaged ; and that he was satisfied on making such enquiries that he, Lachhanji, owned those properties. He also learned that Lachhanji had a son, and he informed Lal Chand about it. It also appears from the evidence of this witness that the negotiation about the loan advanced by the mortgage bond of the 4th of April 1893 was made with Lal Chand, and not with Golab Chand.

In these circumstances it appears to me that, even accepting as true (which may be doubted) the statement of Golab Chand that he was not aware, at the time of the institution of his suit, of the existence of the plaintiff as the son of Lachhanji, it cannot rightly be said that he had not constructive notice of it. I hold that he had notice of the interest of the son.

Then arises the question, whether there has been a violation of the provisions of s. 85 of the Transfer of Property Act, and whether the mortgage decree obtained by Golab Chand against the father only is inoperative and bad in law, so far as the plaintiffs are concerned, and whether they are entitled to succeed in this action simply upon that ground. As regards, however, the lady plaintiff (the step-mother of minor), her rights need not be discussed ; for, if the son is not entitled to succeed, she must equally fail, she having no independent interest in herself. This question does not seem to have been dealt with by the Subordinate Judge in his judgment, though it was raised in the plaint and, substantially, in the issues framed by the Court below.

[735] So far as s. 85 itself is concerned, the exception made therein is as regards persons whose estate may be vested in a trustee, executor, or administrator ; and subject to such exception, it prescribes that all persons having an interest in the property must be joined as parties. The question, however, here is, whether the minor plaintiff was not substantially, through the representation of his father, a party in the mortgage suit instituted by the defendant, though his name was not

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specifically mentioned as such, so that there was no violation of s. 85. With a view to determine this question, it may be useful to consider, in the first instance, what was the state of the law at the time when the Transfer of Property Act was passed, as to the true position of the father in a Mitakshara joint family, and the rights and liabilities of a son, especially of a minor son, jointly interested with his father in ancestral property, when such property is charged by the father for a loan contracted by him, or when it is sold, or is sought to be sold, in execution of a decree obtained against him alone.

In the case of *Suraj Bunsi Koer* v. *Sheo Prosad Singh* (1), the Judicial Committee, in discussing the rights of a son in an undivided Hindu family governed by the law of Mitakshara, made the following observation: "Hence the rights of the co-parceners in an undivided Hindu family governed by the law of Mitakshara, which consists of a father and his sons, do not differ from those of the co-parceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu law imposes upon sons (a question to be hereinafter considered), and the fact that the father is in all cases naturally, and in the case of infant sons necessarily, the manager of the joint family estate." And later on, their Lordships, in considering how far the powers and rights of ordinary co-parceners are qualified by the obligation which the Hindu law lays upon a son of paying his father's debts, quote with approbation the following observations made by Chief Justice Westropp: "Subject to certain limited exceptions (as for instance, debts contracted for immoral or illegal purposes), the [736] whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather." And, then, referring to the case of *Junnuk Kishoree Koonwur* v. *Raghu Nundun Singh* (2), decided by the late Sudder Dewani Adawlut in 1861, and also to the decision of the Judicial Committee in the case of *Giridhari Lal* v. *Kantoo Lal* (3), they say:—"The decision of this tribunal in the beforementioned case of Kantoo Lal, has, however, gone beyond this decision of the Sudder Dewani Adawlut, because it treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court."

In the case of *Bissessur Lal Sahoo* v. *Maharajah Luchmessur Singh* (4), where a question was raised whether, in execution of certain decrees for rent obtained against certain members of a joint undivided Hindu family in respect of properties which stood in their names, the said properties, inclusive of the interest of the other members of the family, could be made liable, their Lordships of the Judicial Committee observed as follows: "It appears to their Lordships that acting on the principle which follows from their finding that this family was joint, it must be assumed that Masaheb Dass is sued as a representative of the family, and that it must further be assumed that Nath Dass in taking the lease of the *mouza* here referred to, Ramnugger, in respect of which the rent was due, must be assumed to have taken it on behalf of the family, and that the debt must be deemed to be a debt for

(1) 5 C. 148 = 6 I.A. 88.
(2) (1861) S.D.A. Rep. 213 (June 1861).
(3) 14 B. L. R. 187.
(4) 6 I.A. 233 = 5 C.L.R. 477.

the family. With respect to the order as to the execution, it appears to their Lordships that the fair construction of it—though it may not be drawn up with much accuracy—is that the decree is not to be executed against the self-acquired property of Masaheb, but against the [737] family property which is there described as that left by Nath Dass for the purpose of distinguishing it from the separate property which may have belonged to Masaheb. The only difficulty with reference to the second and third decrees arises from certain informalities with which they have been drawn up. It appears to their Lordships that looking to the substance of the case, this second decree is a decree against the representative of the family in respect of a family debt, and it is one which could be properly executed against the joint property of the family, and that Meddanpore was a part of that joint property" and later on, they say: "Their Lordships have therefore come to the conclusion that although there may have been some irregularity in drawing up these decrees, they are substantially decrees in respect of a joint debt of the family, and against the representative of the family, and may be properly executed against the joint family property." This was a case of a family consisting of undivided brethren, and not of a father and sons; and yet the principle of representation was accepted and followed in dealing with the question of the effect of a sale in execution of a decree obtained against one of the members only.

In the case of *Nanomi Babuasin* v. *Modun Mohun* (1), where, in execution of a decree obtained against the father for mesne profits in respect of a property in which the family was interested, a certain property belonging to the family was sold, and a suit was brought by the minor sons against the purchaser for recovery of their shares in the property, the Judicial Committee made the following observation: "It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their [738] debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

"The circumstances of the present case do not call for any enquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deen Dyal's case* (2) bound the Court to hold that nothing but Giridhari's coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceeding, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing, unless they can prove that the debt was not such as to

(1) 13 C. 21 = 13 I. A. 1. (2) 3 C. 198 = 4 I. A. 247.

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justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenary interest alone (and in Deen Dyal's case there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale, if the sons had been brought in to oppose the execution proceedings."

No doubt, this was a case, not of a mortgage decree, but a simple money decree, in execution of which the family property was sold ; but the principle of representation of the son by the father in the suit was, as I take it, recognised, and the remarks of the Judicial Committee have a more general application than to the case of a sale in execution of a money decree, as the case of *Daulat Ram* (1), to be next quoted, would show. It will further be [739] observed that the Judicial Committee evidently treated the decree obtained against the father as binding upon the sons, and without committing themselves to saying that the execution proceedings were not so binding, and that they were entitled, as a matter of right, to have the question of the nature of the debt tried, their Lordships said : "Assuming they have such a right, it will avail them nothing, unless, etc."

In the case of *Daulat Ram* v. *Mehr Chand* (1), where the plaintiff, who was the mortgagee, and who, having obtained a decree against his mortgagors, the managing members of a joint family and of the joint business, in which the family was interested, purchased in execution of the decree the mortgaged property, and then sued the other members of the joint family for a declaration that his purchase included their shares in the mortgaged property, and was not limited to the share of the mortgagor ; and where the defendants raised the plea—a plea which was accepted by the Court in India as correct—that the decree and execution sale did not affect their interest, inasmuch as they were no parties to either the mortgage or the mortgage suit; their Lordships of the Judicial Committee held that the Court in India was wrong in deciding, as it did, the question upon which the defendants made their stand, "namely, that as they had not been made parties to the action, their shares in the property had not been sold; " and observed as follows : "It appears from the cases that have been cited that notwithstanding the defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree, and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties or only the right, title and interest of the two parties who were made defendants. In the case of *Pursid Narain Singh* v. *Hanooman Sahai* (2) Mr. Justice Pontifex in giving his decision says : "It has been decided that, if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is [740] necessity) mortgages the whole sixteen annas of the ancestral property, then in a suit by the mortgagee the sale under the decree would pass the whole sixteen annas of the mortgaged property, although the mortgagor alone was made defendant; and the reason for such decision probably is that the sixteen annas having been validly mortgaged to the

(1) 15 C. 70=14 I.A. 187. (2) 5 C. 845 (852).

mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right validly acquired to have the whole sixteen annas sold;" and they then quote in support of their decision their remarks in the case of *Nanomi Babuasin* (1), to which I have already referred; namely: "Their Lordships do not think that the authority of Din Dyal's case bound the Court to hold that nothing but Giridhari's co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing, unless they can prove that the debt was not such as to justify the sale." They then go on to say: "When the plaintiff applied to be let into possession under the certificate of sale, the defendants objected. He thereupon brought this suit, and the defendants had the opportunity of trying whether the mortgage was a valid mortgage which bound the ancestral property. The plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding upon them. The defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit, and the two mortgagors alone had been sued. But that ground falls under them"; and so on. In this case also, the principle of representation was fully recognized, and the plea that the mortgage decree was inoperative, so far as the interest of the son was concerned by reason of his not being made a party to the suit in which that decree was passed, was negatived.

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[741] In the case of *Bhagbut Pershad* v. *Girja Koer* (2), where three fathers had mortgaged a certain property for debts incurred by them, and where, in execution of the decree passed against them, the property was sold, as the right, title and interest of those individuals, and a suit was brought on behalf of the minor sons and their mothers for recovery of the property, and where it was not proved that the debt was incurred for improper purposes, but that the lender had not made proper inquiries to ascertain whether there was any real necessity for the loan, the Judicial Committee in disagreeing with the High Court in the conclusion that they came to, observed as follows: "It must be borne in mind that this was not a case of a joint family consisting of brothers, but it was one consisting of fathers and children; and it has been held that sons are liable to pay the debts of their fathers, unless incurred for immoral or illegal purposes." And later on they say: "Now, although at the time of the sale notice was given on behalf of the children that the property was joint ancestral property, and that the fathers had no right to mortgage it, still the question arises whether, under the execution of the decree under which the property was ordered to be attached, it was for the purchaser to shew that there was a necessity for the loan, or whether it was not necessary for those who claimed on behalf of the children to shew that the debt was contracted for an immoral or illegal purpose. If it was necessary to shew that the debt was so contracted the plaintiffs failed to prove the fact, and that is so found by the High Court. It appears to their Lordships that according to the decision in the case of *Suraj*

(1) 13 C. 21 = 13 I. A. 1.

(2) 15 C. 717 = 15 I. A. 99.

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Bansi Koer v. *Sheo Pershad Singh* (1), it was necessary for the plaintiffs to show that the debt was contracted for an illegal or immoral purpose." And they then refer to the law laid down in the case of *Nanomi Babuasin* v. *Modun Mohun* (2) and say as follows: "It appears, therefore, from the decisions that in a case like the present, where sons claim against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not [742] necessary for the creditors to shew that there was a proper enquiry, or to prove that the money was borrowed in case of necessity;" and they accordingly dismissed the suit of the sons.

In the case of *Mohabir Prosad* v. *Maheshwar Nath Shahi* (3), where a Mitakshara father had mortgaged a certain property to the defendants, and the latter obtained decrees upon such mortgages against the father, and, in execution of such decrees, the property was advertised for sale, and was subsequently sold, and then the son and wife brought a suit for the purpose of contesting the right of the defendants to bring the property to sale, and in which an issue was raised whether the share of any other person than that of the father was bound by the debt, the Judicial Committee observed as follows: "It has been considered whether the sale was necessary for the benefit of the family estate; but the question is whether the plaintiff, who is the son of the judgment-debtor, can set up his right as a co-sharer to impeach a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only do so on condition that he shews the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit." And they then dealt with the question whether the sale meant to convey the entire family property, or only the limited interest of the father, and held that the whole family property passed to the defendant.

The cases to which I have referred are no doubt cases where, in execution, either of mortgage decrees or simple money decrees, obtained against the father or the managing member of the joint family, the family property was sold; but the question was raised how far proceedings taken against the father or the managing member alone affected the interest of the son, or the other members of the family; and the principle was never affirmed (rather was disaffirmed), as it is now contended for, that because the son, or a member of the joint family, was not made a party to the suit in which the decree was obtained, he would be entitled to recover his share in the property, irrespective of any other consideration.

[743] From these cases three principles may, I think, be well gathered: *first*, that in the case of a joint Mitakshara family, consisting of a father and minor sons, the father is "necessarily" the manager of the joint family, and as such, for all purposes, is the representative of the family; *second*, that in the case of a joint Mitakshara family, where the father, the managing member, mortgages family property for an antecedent debt, and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him in his representative capacity; and *third*, that if a son, after a decree being obtained against the father, upon a mortgage executed by the latter, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution of such a decree, sues to recover possession of

(1) 5 C. 148 = 6 I.A. 88. (2) 13 C. 21 = 13 I.A. 1. (3) 17 C. 584 = 17 I.A. 11.

his share, he cannot succeed, unless he proves that the debt was contracted for immoral or illegal purpose, or that the debt was of an illusory character. 1900 MAY 7.

Such are the principles, as I take it, that were recognized at the time of the passing of the Transfer of Property Act; and the question here arises, whether it was the intention of the Legislature so to alter the law as to declare, as has been contended for before us, that the father of a joint Mitakshara family cannot be regarded, for the purposes of a mortgage suit, as the representative of his son, even of a minor son, and that the latter is entitled to succeed in an action against the creditor, as a matter of course, simply because he was not, in terms, made a party to the suit in which the decree was obtained.

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Section 85 of the Transfer of Property Act, no doubt, enjoins (save and except in the case of persons mentioned in s. 437 of the Code of Civil Procedure) that all persons having an interest in the mortgaged property must be joined as parties to the mortgage suit; and it is quite possible, if the fact of the existence of the plaintiff as the son of the mortgagor had been brought to the notice of the Court in which the mortgage suit was instituted, and if there arose any question or doubt whether the father was sued in his representative capacity, the Court would have insisted upon the son being added as a party, or would have dismissed the suit upon the ground of non-joinder of necessary parties. But no such question was then raised, and the Court made a decree in favour [744] of the mortgagee, declaring that the mortgaged property was liable to be sold in satisfaction of his claim. If this decree be regarded as one passed against the father in his representative capacity, there was no violation of the provisions of s. 85 of the Transfer of Property Act. That section, as I understand it, lays down only a rule of procedure. The principle embodied in it was for a number of years recognized in our Courts, and it was well understood that a mortgage decree obtained in the absence of a party interested in the property involved in the mortgage could not affect his interest in the property: see *Syud Emam Momtazuddin Mahomed* v. *Raj Coomar Dass* (1), decided by a Full Bench of this Court. But it should be borne in mind that a Mitakshara son, acquiring by birth a joint co-parcenary interest with his father in the ancestral property, but bound at the same time to pay his debts out of that property, can hardly be regarded as occupying exactly the same position as any other person interested in the same property: his position is, rather, unique in character; for in all transactions—especially if he is a minor—the father represents him, and the father may validly sell or mortgage the ancestral property for an antecedent debt of his, if such debt is not incurred for immoral or illegal purpose. If the mortgage by the father in such a case is valid without the son being made a party to the transaction (and it must be upon the ground of representation), it is rather difficult to understand why a suit upon the mortgage against the father alone should not be regarded as a good suit for the purpose of binding the property, and having a lien declared upon it.

It has, however, been said that a father in a Mitakshara family, when sued alone, cannot be regarded as sued in his representative character, because the defence of the father would not raise the defence which is open to the son. As to this, I desire to say that, as held in the case of *Suraj Bansi Koer* v. *Sheo Pershad Singh* (2), the father is "naturally" and "necessarily" the manager of the estate, and therefore when the father

(1) 14 B.L.R. 403. (2) 5 C. 148=6 I.A. 88.

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is sued, he is sued in his representative capacity; and that it is evidently by reason of the consideration that the son is entitled to raise some other defence to the claim of the creditor, [745] than what is open to the father, that the Privy Council have declared that it is open to the son in a suit of his own, or in defence to a suit brought by the purchaser in execution of a decree against the father, to show that the debt incurred by the father was tainted by immorality, or was not otherwise binding upon him. The argument against representation, if correct, would apply not only to a mortgage suit, but also to an ordinary suit for debt instituted against the father alone. If, in execution of a decree for debt against the father, the family property be sold, it could scarcely be contended that the decree was inoperative against the son, simply because the son was not represented in the suit in which it was obtained, and that therefore the sale did not pass the interest of the son [see *Nanomi Babuasin* v. *Modun Mohun* (1)].

The Legislature, in framing s. 85 of the Transfer of Property Act, could hardly have intended to ignore or supersede the law, as it was laid down by the Judicial Committee in so many cases, and to include a Mitakshara son—much less a minor son—in the description of "all persons having an interest in the property comprised in the mortgage," who must be, in terms, made parties to the mortgage suit. And it seems to me that the first portion of the section, where it refers to s. 437 of the Code, does not necessarily mean to lay down that the cases mentioned in that section are exhaustive, and that in no other instance could a suit be regarded as instituted against a party in his representative capacity. This view I think is, to some extent, supported by s. 436 of the Code of Civil Procedure, which allows of a corporation being sued in the name of an officer or trustee when so authorised.

The principle of representation of a Mitakshara son by his father, I observe, has also been recognized in some of the High Courts in India, even after the passing of the Transfer of Property Act. In the case of *Jagabhai Lalubhai* v. *Vijbhukan Das* (2), where in execution of a decree obtained against a father an ancestral property was attached, and the sons brought a suit to contest the attachment; West, J., following the decision of the Judicial [746] Committee in *Nanomi Babuasin* v. *Modan Mohun* (1) observed:—"The father in fact is made the representative of the family, both in transactions and suits subject only to the right of the son to prevent an entire dissipation of the estate by particular instances of wrong doing on the father's part." And later on he said: "In the present instance the father was really sued as the head of a firm. It seems that the debt was one for which the sons would be liable," etc.

As bearing, however, upon the question, whether a suit instituted by a mortgagee against the father alone, for the enforcement of his mortgage, should not be regarded as brought against him in his representative capacity, the matter for consideration is what may be the nature of the debt for which the mortgage was given. If the debt was contracted for an immoral purpose, it could not be said that the father represented the son, either in that transaction, or in the suit brought for enforcement of such debt; and it would follow from this that the decree was not operative against the son. But if, on the other hand, the debt was not incurred for an immoral or illegal purpose, the son being under obligation to pay his father's debt, and the father being the *kurta* and managing member of the joint family, the

(1) 13 I. A. 1=13 C. 21. (2) 11 B. 37.

suit and the decree would be regarded as having been brought and obtained against him in his representative capacity, the touch-stone in such a case being the validity of the debt contracted.

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It has, however, been said that the object of s. 85 of the Transfer of Property Act is to discourage multiplicity of suits, and therefore when a creditor suing to enforce a mortgage security has notice of the interest of the son, he is bound to make him a party to the suit, and that in this respect a suit for a simple debt stands upon a different footing; for in such a case the creditor, if he does not make the son a party, simply incurs the risk of having the fact or the nature of the debt questioned in a separate suit. No doubt s. 85 of the Act contemplates that all questions arising upon the mortgage should be, if possible, determined in one and the same suit, but it does not, I think, necessarily follow from this that a Mitakshara son, especially a minor son, must, in terms, be made a party to the suit, if substantially he was so [747] made a party through the representation of his father. No doubt, if he be specially named as a party, and in the case of a minor son some other guardian than the father is appointed by the Court to represent the minor, the decree would be absolutely binding upon the son; and this certainly has the effect of avoiding a subsequent litigation. But it will be observed that the object which the section has in view cannot be attained when the mortgagee has no notice of the existence of the son, and in that event the question of the liability of the son under the mortgage, though it is so desirable it should be determined in one and the same suit, must necessarily have to be decided in a separate suit, just in the same manner as if the decree was obtained against the father alone for a simple debt. It has again been said that in a case where the mortgagee has notice of the interest of the son, but does not make the son a party, he wilfully disobeys the law, and it would be anomalous to put him in the same position as a person who has no such notice. The whole question, however, is whether the father is sued in his representative capacity; if he is so sued, there is no wilful violation of the directions of the law. If the creditor has notice, but does not make a minor son (as in this case), in terms, a party, it is probably because he considers that the son is represented by the father: his conduct I think is hardly consistent with any other theory.

But even if we were to hold that there was a violation of the rule of procedure (as I take it to be) prescribed in s. 85 of the Transfer of Property Act, by reason of the minor plaintiff having not been, in terms, made a party to the mortgage suit, is the plaintiff entitled to succeed in this case as a matter of course?

In every instance, which occurred before the Transfer of Property Act was passed (when the same rule of procedure as embodied in s. 85 was thoroughly recognized), where in execution of a mortgage decree against the father alone the family property was sold, and a suit was brought by the son to contest the legality of the sale, or a suit was brought by the purchaser against the son, the Judicial Committee held that the only remedy left to the son was to prove that the debt for which the mortgage was given was not binding upon him, and, unless this was proved, the sale would be binding upon him.

[748] Is there anything in s. 85 of the Transfer of Property Act which compels us to take a course different from that which the Privy Council so repeatedly laid down, and to hold that because the decree is defective by reason of the son being not, by name, made a party to the mortgage suit, he is entitled to relief, on that ground alone, in this case?

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Can he do so without proving that the mortgage given by the father, upon which the decree was obtained, is not binding upon him? If the decree was a money decree, and property was sold in execution thereof, as it was in the case of *Nanomi Babuasin* v. *Modun Mohan* (1), he could not be heard to say what he now says, but he would be told as the Privy Council said in that case: assuming that you are not bound by the sale, it can avail you nothing, unless you prove that the debt was not such as to justify the sale. Should a different rule be adopted if there be a mortgage, and in execution of the mortgage decree obtained against the father the property is sold, or is sought to be sold? Having regard to the principle which underlies the cases decided by the Judicial Committee of the Privy Council, I am not prepared to answer this question in the affirmative.

Our attention has been called to the case of *Bhawani Pershad* v. *Kallu* (2) decided by a Full Bench of the Allahabad High Court, in which a view contrary to that which I adopt, seems to have been expressed by the majority of the Judges who composed the Full Bench. I am, however, unable to accept the said view. I am rather inclined to follow the view that was adopted by the dissentient Judge, Banerji, J.; and I observe that the decision of the Allahabad High Court has been dissented from by Shephard, J., in Madras, in the case of *Ramasamayyan* v. *Virasami Ayyar* (3) and by Subramania Ayyar and Moore, JJ., in the case of *Palani Goundan* v. *Rangayya Goundan* (4).

For these reasons I would overrule the point raised before us in regard to the effect of s. 85 of the Transfer of Property Act.

[749] The second point raised before us is as to the nature of the debt for which the mortgage was given by the father, it being contended on behalf of the appellant that the income of the family property was sufficient for the legitimate expenses of the family, and that the mortgage was given with a view to raise money for immoral purposes. There can be no doubt upon the evidence that the deceased Lachhanji led an immoral and extravagant life; but it is by no means clear that the money covered by the mortgage of the 4th April 1893 was borrowed for any immoral purpose. As already said, there were two decrees of Sant Pershad and Ram Buksh, respectively, for the sum of Rs. 1,700. The debt due to Sant Pershad was incurred by the mother during the plaintiff's minority, and in execution of the decree obtained by Ram Buksh, the father of the plaintiff was about to be arrested; and it was to discharge the debts under these two decrees, and also to pay off, as stated in the mortgage bond, certain petty debts, the mortgage in question was given. What those petty debts were, the defendant is not in a position to prove. But the plaintiff has not produced the account books which, it is said by his witness Bikramajit Lal, were kept by him. These account books, if produced, would have shown how the money borrowed by Lachhanji was spent. It was, however, stated by Bikramajit Lal that on the evening of the day when the partition suit instituted on behalf of the son was decreed against Lachhanji, the latter in a fit of wrath destroyed all the account papers. This story is obviously untrue. It may be, as the Subordinate Judge in his judgment states, that Lachhanji kept no accounts; but having regard to the story told by his man of business, Bikramajit Lal, who now comes to support the plaintiff's case, we are bound to say

(1) 13 C. 21=13 I.A. 1. (2) 17 A. 537.
(3) 21 M. 222. (4) 22 M. 207.

that the destruction of the account books, as alleged, is palpably false. It has also been stated by some of the witnesses on behalf of the plaintiff that out of the sum of Rs. 3,000, which was borrowed under the mortgage bond of 9th October 1891, and which was included in the later bond of the 4th April 1893, Rs. 1,100 was paid to a woman, Ghansbandi, who was in the keeping of the deceased, and that this amount was paid in the *kothi* of the mortgagee, and that the latter knew all about it. I am also unable to accept this story as true.

[750] I therefore hold, upon the evidence, that it has not been proved that the money covered by the mortgage bond of the 4th April 1893 was borrowed for any immoral purpose. The Subordinate Judge seems to be of opinion that it was the duty of the plaintiff to show that any portion of the money raised by Lachhanji was actually applied to immoral purposes. He need not have done so. It would have been sufficient if he could show that the debt was contracted for an immoral purpose.

It has, however, been contended on behalf of the appellant that, having regard to the fact that Lachhanji began contracting debts within a short time after he attained majority, and to the fact that several bonds were executed by him within a short time of each other, the transactions should be regarded as unconscionable, because the lender evidently took advantage of the youth of the deceased. I am not prepared to accept this view of the matter, when it appears upon the evidence that the father of the deceased left debts to the amount of Rs. 2,000, which so far from being discharged by the mother of the deceased during his minority, augmented to Rs. 5,000, and where we also find that there were decrees outstanding against the deceased, and upon one occasion, that is to say, when the mortgage bond of the 1st May 1892 was executed, a considerable sum of money, Rs. 900, was required to pay the rent due upon one of the family properties.

The last point raised on behalf of the appellant was in regard to the commission said to have been deducted by the mortgagee at the time when the loans were contracted. The evidence no doubt raises a suspicion that some portion of the money was so deducted, but the story told on behalf of the plaintiff that 20 per cent. was deducted in every instance is incredible. But, however that may be, I am not prepared to find on the evidence, such as it is, that any commission was, as a matter of fact, deducted from the money for which the mortgage in question was given, and if deducted at all, what was the amount thereof.

Something was said about the partition decree obtained by the son against the deceased Lachhanji, and that the mortgagee is not entitled to enforce his security against the portion of the family property allotted to the plaintiffs. It will, however, be observed [751] that the partition suit was instituted after the suit by the mortgagee for enforcement of his mortgage security, and yet the mortgagee was not made a party to the partition suit. It is obvious, therefore, that the rights of the defendant under the mortgage cannot be affected by the decree made in the partition suit, supposing that it was a perfectly *bona fide* proceeding.

Upon all these grounds I think this appeal should be dismissed.

MAY 7, 1900. HARINGTON, J.—The suit, which gives rise to the present appeal, was instituted by Lalla Suraj Prosad (a minor suing by his next friend Tapesar Koer) and Mussamut Lakh Rani Koer against one Golab Chand, for the purpose of obtaining a declaration that a certain mortgage bond and decree obtained thereon by the defendant were not

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binding on the plaintiffs, so far as their interest in the mortgaged property was concerned.

The plaintiffs are the son and the widow of one Lachhanji, who died in July 23rd, 1894; the defendant is a money-lender in the town of Chuprah. On April 4th, 1893, Lachhanji executed a simple mortgage bond in favour of the defendant, and by it mortgaged certain ancestral property alleged to be held by him in proprietary right as security for the repayment of a sum of Rs. 6,900 and interest. The mortgagee instituted a suit on this bond against Lachhanji under chap. IV of the Transfer of Property Act, and in October 3rd, 1893, obtained a decree directing him to pay to the plaintiff or to deposit in Court the amount claimed with interest, and ordering that in default of payment the mortgaged property should be sold at an auction sale, and the proceeds applied in satisfaction of the decree. The plaintiff No. 1 in the present action objected to the sale, but was referred to a regular suit, which was accordingly brought, and against the decision in that suit the present appeal is preferred by the plaintiff No. 1 together with his mother. The plaintiffs rested their case mainly upon three grounds:—

(1) That because they were not parties to the mortgage or mortgage suit, the decree in the mortgage suit was not binding on them.

(2) That the family property has been partitioned, and therefore their two-third share cannot be attached.

[752] (3) That the debts were contracted by the mortgagor for immoral purposes, and therefore are not binding on any members of the family other than the mortgagor.

The learned Subordinate Judge dismissed the plaintiff's suit, and, against that decision the present appeal is brought. The facts leading up to the execution of this mortgage, and the evidence in the case have been fully dealt with by my learned brother. I do not propose therefore to deal with them to any greater extent than is necessary to elucidate the conclusion to which I have come.

The second and third questions present but little difficulty, and inasmuch as I agree in thinking that on neither of these two points has any ground for interfering with the judgment of the Court below been established, they can be very shortly disposed of. I agree that the partition having taken place after a mortgage purporting to bind the whole family property had been validly created by the father whatever property the son or widow could take under that partition would be subject to the mortgage lien created by the father, and would be under a liability which the mortgagee by properly constituted proceedings would be able to enforce. This therefore disposes of the case made by the widow, or raised by the son on the partition. It becomes unnecessary too to discuss the evidence as to whether the debts which are the subject of the mortgage deed in question were contracted for immoral purposes, inasmuch as I agree with the conclusion to which both my learned brother and the learned Judge in the Court below have come on this question. The mortgage formed one of a series of mortgage transactions, and the money, as my learned brother has pointed out, appears to have been borrowed for perfectly legitimate purposes. No doubt the plaintiff has given general evidence of immoral and improper conduct on the part of Lachhanji, but I do not think that that general evidence justifies us in coming to the conclusion that the particular debt in respect of which this mortgage bond was given was in fact incurred for immoral or illegal purposes. I

think, therefore, that the plaintiff fails to discharge his liability on the ground that the debts were created for illegal or immoral purposes. 1900 MAY 7.

[753] I now pass on to the remaining question which is one of considerable difficulty, and has been the cause of much conflict of judicial opinion. APPELLATE CIVIL.

That question is whether, assuming the liability created by the mortgagor to have been created perfectly validly, and to be binding on the ancestral property to the fullest extent, the mortgagee (having notice of the son's interest) is entitled to enforce that liability by a mortgage suit without making the son a party under s. 85 of the Transfer of Property Act, and, if he is not so entitled, whether the son is entitled in the present suit to have the decree so obtained declared void as against his interest. In other words, whether the plaintiff in the present action is entitled to say that that liability, though properly created, cannot at present be enforced against his share of the family property, because at present the mortgagee has not taken the proceedings proper for binding his share, but has chosen to bring his action without making him a party in disobedience to an act which says he shall make him a party. 27 C. 724= 4 C.W.N. 701.

Shortly summarized, the argument on behalf of the appellants is as follows :

Section 85 of the Transfer of Property Act says that all persons having an interest in the mortgaged property of whose interest the mortgagee has notice must be made parties to a mortgage suit. Golab Chand had notice of the interest of Lalla Surja Prosad in the property comprised in the mortgage executed by Lachhanji, and therefore Golab Chand was bound to make Lalla Surja Prosad a party in the mortgage suit. This Golab Chand did not do. Lalla Surja Prosad therefore says that Golab Chand's suit was not legally constituted as far as he was concerned, and that he is entitled to claim that his liability which Golab Chand seeks to enforce against his interest in the mortgaged property shall not be enforced unless and until a decree is obtained against him in a suit properly constituted according to law.

The argument for the respondent is shortly this: Before the passing of the Transfer of Property Act there was a recognized rule of procedure by which all persons interested in a mortgaged property should be made parties to a suit relating to that mortgaged [754] property, unless their interests were sufficiently represented in the suit. Section 85 affirms but does not extend this well recognized rule. It has been held in cases arising before the Transfer of Property Act that a decree obtained against the father of an undivided Hindu family in a suit on a mortgage of the whole ancestral property was binding on the son's interest notwithstanding that they were not parties to the mortgage or to the suit brought thereon, and that the only way in which a son could question the decree was by establishing in a suit of his own, that the debt either did not in fact exist or had been contracted, for illegal or immoral purposes. Under the law, therefore, as it has been laid down previous to 1882, Lalla Surja Prosad would have been unable to succeed in the present suit, and, therefore, the law not having been altered by s. 85, he is equally disentitled to succeed in the present action on any other ground than that the debts were non-existent or were incurred for illegal or immoral purposes, and that ground he has failed to establish.

If, therefore, the facts that the son is a person having an interest in the mortgaged property, and that the mortgagee had notice of that interest at the time he brought his suit are proved, the sole questions in issue

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will be: (I) Does s. 85 of the Transfer of Property Act compel the mortgagee to make him a party, and (II) what are the consequences of a refusal by the mortgagee to make him a party?

Now, s. 85 of the Transfer of Property Act is in these words that "Subject to the provisions of the Civil Procedure Code, s. 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter (*viz.*, chap. IV) relating to such mortgage: Provided the plaintiff has notice of such interest."

Section 437 of the Civil Procedure Code says: "In all suits concerning property vested in a trustee, executor or administrator, when the contention is between persons beneficially interested in such property, and a third person, the trustee, executor, or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the Court may, if it thinks fit, order them, or any of them to be **[755]** made such parties." "Notice" is defined by s. 3 of the Transfer of Property Act, but it is unnecessary to set out that section for the evidence of Chattu Lal who was acting as agent for Golab Chand shows that he made enquiries as to Lachhanji's position before the money was advanced, and that he ascertained that Lachhanji had a son, and that he reported that fact to Lal Chand who carried on business jointly with Golab Chand; and though Golab Chand denies that he knew Lachhanji had a son, he admits that Lal Chand consulted him about the propriety of making the advance. Clearly therefore the mortgagee had by his authorized agent notice of the interest of the present plaintiff. Indeed it is very improbable that the fact of the plaintiff's existence, which had been reported to his partner, would not have been brought to the knowledge of the mortgagee in the course of the discussions which the evidence discloses he had with his partner as to lending the money. That being so I think it is clear that the mortgagee had notice of the existence of the plaintiff, and the presumption beingt hat the family is joint, such notice is equivalent to notice of the interest which the plaintiff had in the mortgaged property.

It being established therefore that the mortgagee had notice, does a son in a Mitakshara family, who, on his birth, obtains a coparcenary interest in the ancestral property, come within s. 85, or is he to be excluded on the ground that the section merely lays down a former rule of procedure, under which he has never been held to be a necessary party to a mortgage suit? This must depend on what the Legislature has expressed in s. 85, for to quote the words of an eminent English Judge, in a case reported a few years ago with reference to the duty of the Court in construing an Act—"our limited function is not to say what the Legislature meant; but to ascertain what the Legislature has said that it meant" (1). Applying that principle which has been stated in a varying language by numbers of eminent Judges, and is as applicable to a Court here, as to a Court in England, I do not think it is open to the Court to give any meaning to s. 85 **[756]** other than that which the Legislature has expressed. The words in which the section is couched are the plainest and most explicit known to the English language. It is expressed to apply to "all persons having an interest, except those whose interests are represented by trustee, executor, or administrator, provided the plaintiff has notice of the

(1) *Per* Mathew, J., in Rothschild *v.* The Commissioners of Inland Revenue, (1894) L. R. 2 Q. B. 142 (145).

interest." No authority is needed for the proposition that a son in a Mitakshara family takes on birth an interest in the family property. I do not think it open to the Court therefore to hold that a Mitakshara son does not fall within the section, because to hold otherwise would be to say that the Act had changed, not the law relating to the liability of the son's interest in mortgaged ancestral property, but the constitution of the suit by which that liability is to be enforced.

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When the section is couched in ambiguous language and the meaning of the Legislature is not clear, no doubt it is important to consider which out of two constructions the language was intended to bear, but where the words of the Act admit of no ambiguity I do not think I am entitled to add to or take from them ; I can only construe them according to the ordinary meaning which the words bear in legislative enactments. The word " person " need not necessarily mean individual. It might be used to express a number of individuals, as for example a corporation entitled to sue and be sued in its corporate capacity ; but I do not think it could be said that the different members of a Hindu joint family could be described in law as a " person."

It was argued that although the son is not made a party to the mortgage suit by name he is in effect a party or his interests are sufficiently represented by his father, for whose debts, if not immoral, the son's interest in the family properties is liable. But I cannot agree to that contention, and I express my conclusion with diffidence as it differs from that arrived at by my learned brother. The Legislature have provided by a reference to s. 437 of the Civil Procedure Code that certain definite persons shall be treated as representing other person's interest, but neither by particular description, nor by general words have they authorized the plaintiff in a mortgage suit to treat the father in a Hindu joint family as representing the son's interests, and therefore I do not think it open [757] to the Court to supplement the words of the Act, and to say that they are entitled to be considered as represented by their father.

Moreover the defence open to the father would not raise the defences open to the son, for he would be liable on his mortgage even though the money he had raised had been applied to immoral purposes—whereas, if that fact was established on behalf of the son, it would discharge his liability. Having regard, therefore, to the words of the Act, and to the fact that the liability of the father and of the son depends on different considerations, I do not think it can be said that the son is in effect a party through his natural representative.

For these reasons, therefore, I came to the conclusion that the plaintiff in the present suit ought to have been made a party to Golab Chand's mortgage suit.

This has not been done and the question arises what is the effect of not making him a party, and as to this I regret that the conclusion I arrive at differs from that to which my learned brother has come. Does it place the present plaintiff in the position he would have occupied, if the mortgagee had had no notice, and therefore had not been bound to make him a party, or does it entitle him to say that the mortgagee, having refused to make him a party as provided by s. 85, is not entitled to affect his interest by a decree obtained in his absence ?

This question has never, as far as I am aware, come before the Privy Council : the numerous cases cited from that tribunal deal with the liability of sons for their father's debts, and do not touch the question whether s. 85 of the Transfer of Property Act has rendered it necessary to make

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the son a party. But it has arisen in three cases in this country. The first is *Bhawani Pershad* v. *Kallu* (1) in which it was held in a Full Bench reference by a majority of five Judges to one that where a plaintiff sued on a mortgage against a Mitakshara father as a mortgagor without joining sons of whose interest he had notice, and obtained a decree against the whole family property the sons in a separate suit were entitled to obtain a declaration that the mortgagee was not entitled to sell up their interests. This decision [758] was dissented from in the case of *Ramasamayyan* v. *Virasami Ayyar* (2) by Shephard, J., although the question did not really arise. The decision in the latter case was undoubtedly right as there was no allegation or evidence that the mortgagee had any notice of the plaintiff's interest, and it is on this ground that Davies, J., the other Judge composing the Court, who carefully guards himself against dissenting from the Allahabad case, rests his judgment. The judgment of Shephard, J., in this case has been followed in the case of *Palani Goundan* v. *Rangayya Goundan* (3), but it is followed without any discussion as to the grounds on which it is to be supported. The learned Judge, who, dissented from the opinion of the majority in the case of *Bhawani Pershad* v. *Kallu* (1), ruled that s. 85 of the Transfer of Property Act did not lay down any rule of substantive law. For reasons which I have given I do not think it open to me to go outside the words of the section to determine what the Legislature meant, and in my opinion to say that the Legislature did not mean to lay down a substantive rule of law is to attribute to the Legislature a meaning other than that which has been expressed in the very positive language of s. 85.

He is influenced too in his judgment by the anomaly which is said to be created, if it be held that a mortgagee plaintiff is not entitled to sell up the son's interest in the ancestral property, without making the son a party to the suit, while the holder of a simple money decree is so entitled. I do not think there is anything anomalous in the supposition, that a plaintiff, who is seeking by foreclosure or sale to extinguish the rights of persons other than his debtor in mortgaged property should be bound (if he have notice) to give those persons an opportunity of being heard in defence of their interests, and that a plaintiff, who is seeking a simple money decree against his debtor personally, should not be bound to make persons parties whose interest may be affected, if the defendant fails to pay the amount of the decree. At any rate, if any anomaly is created, it is due to the fact that the Legislature has given plaintiffs in ordinary suits for money under s. 28 [759] of the Civil Procedure Code a discretionary power as to who they shall make defendants, while it has imposed on them a positive duty under s. 85 in mortgage suits under chap. IV of that Act.

No general rule has, I believe, been laid down from which one can determine what are the consequences of a non-compliance with any particular statute: those consequences are to be ascertained by a consideration of the words of the statute, and of the mischief at which the statute is aimed. Here the words are imperative to the last degree, and, if it rested on the words alone, I should be inclined to hold that, even supposing the suit were not liable to be dismissed *in toto*, as to which I express no opinion, the Court was only entitled by virtue of s. 31 of the Civil Procedure Code to deal with the right and interest of the person actually before it.

(1) 17 A. 537. (2) 21 M. 222. (3) 22 M. 207.

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The object of the section appears to be to discourage a multiplicity of suits by compelling a mortgagee to make all persons of whose interest in the mortgaged property he has notice parties to his suit instead of leaving them to enforce their rights by bringing other actions.

If this is the object, it seems to me that it will be defeated, if it is held that the only consequence of non-compliance with it is to expose the mortgagee to other actions. It is to be observed that, in an ordinary action for debt, the plaintiff "may" under s. 28 of the Civil Procedure Code make the sons of a joint Hindu family defendants, if he desires to enforce their liability for a debt contracted by their father: if he does not he runs the risk of having the fact or nature of the debt contested by a separate suit. Under s. 85, on the other hand, he "must" make persons of whose interest he has notice parties to the suit. It seems to me anomalous to hold that the consequences to a plaintiff are the same, whether he neglects to avail himself of the permission accorded by s. 28 of the Civil Procedure Code, or refuses to obey the imperative direction of s. 85 of the Transfer of Property Act.

The two learned Judges, who dissent from the majority of the Allahabad High Court, appear to consider that a suit brought [760] in contravention of s. 85 of the Transfer of Property Act would be liable to be dismissed for non-joinder of parties [*per* Banerjee, J., in *Bhawani Prosad* v. *Kallu* (1), and Shepherd, J., in *Ramasamayyan* v. *Virasami Ayyar* (2)], and one at least considers that a mortgagee so suing runs the risk of having his decree limited to the personal interest of the mortgagor. Now I cannot see how he can be exposed to these risks, excepting on the assumption that "the person having an interest" is a necessary party under s. 85 (if the plaintiff have notice), and that the Court cannot rightly make a decree in the absence of a necessary party affecting his interest in the mortgaged property, and, if it be once conceded that the Court could not rightly pass a decree affecting his interests, because he was a necessary party and not present, it seems to me a very anomalous position to take up to say that he on his part, on proving that he was a necessary party, and not present, is not entitled to a declaration excluding his interests from the operation of the decree.

Lastly, it is said, that he runs the risk of having to defend another suit in which the nature or fact of the debt may be questioned. But this risk does not depend on the non-observance of s. 85; it must exist where there are sons of whose existence the mortgagee has had no notice, and, who, in consequence he is not bound to make parties under s. 85 and moreover it is a risk which he runs in any simple action of debt, if he elects not to make the sons parties.

For these reasons, in view of the apparent object of the section and on comparing the words of s. 85 of the Transfer of Property Act with those of s. 28 of the Civil Procedure Code, I am led to the conclusion that a mortgagee is not entitled to a decree affecting the interest of any person of whose interest he has notice and whom notwithstanding he refuses to make a party, and that in the present case no decree ought to have been made affecting the interest of Lala Surja Prosad; and that that having been done, which ought not to have been done, the plaintiff in the present suit is entitled to a declaration that the mortgage decree does not affect his interest, not [761] on the ground that he is not liable, but on the ground that the mortgagee has not taken proper steps to enforce his liability.

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(1) 17 A. 537 (550). (2) 21 M. 222 (224).

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To hold otherwise would land one in this very anomalous position. We must decide that a plaintiff who has notice of other persons interests, and who wilfully refuses to make them parties, gets, notwithstanding his wilful disobedience to the positive direction in s. 85, a decree binding the interest of those persons to precisely the same extent as it would have been binding, if from want of notice he had not been obliged to make them parties. This involving as it does the proposition, that a mortgagee is able to bind the interest of persons not parties to the suit whom the law says he must make parties to precisely the same extent as he can bind the interests of those whom the law does not compel him to make parties, seems to me to involve a far graver anomaly than that involved by holding that s. 85 of the Transfer of Property Act has imposed duties on a mortgagee plaintiff, which are not imposed on a plaintiff, in a simple action of debt under s. 28 of the Civil Procedure Code.

It is unnecessary to discuss the judgment (1) of the Chief Justice and the other Judges of the Allahabad High Court, inasmuch as I agree with the conclusion to which they have come. In my view while it inflicts no hardship on a mortgagee to hold that he must make parties to his suit those whose interests he knows of and desires to bind ; it confers a great advantage on the sons in a joint Hindu family to compel a plaintiff-mortgagee to make them parties. For it is in the cases in which the father has borrowed money for immoral purposes that they are entitled to save their property, and it is just in those very cases that we should expect to find (if they were too young to look after their own interests) their rights least safe-guarded by their father. To hold therefore that the statute applies will enable the Court to protect the interests of persons who are in many cases unable to protect themselves, and this is consonant not only with the spirit but with the actual words of s. 42 of the Civil Procedure Code, which enjoins that every suit shall be so framed as to prevent further litigation on the subject-matter in dispute.

[762] For these reasons I come to the conclusion that the mortgagee was bound to make the plaintiff a party to the mortgage suit, that not having done so he was not entitled to obtain a decree affecting the plaintiff's interest. I am therefore in favour of reversing the decision in the Court below and giving the plaintiff the relief he seeks for in this action.

MAY 7, 1900.—GHOSE and HARINGTON, JJ.—We do not think, we are called upon in this case to refer the question, upon which we disagree, to a third Judge ; but we prefer to follow the course prescribed by the second paragraph of s. 575 of the Code of Civil Procedure. The appeal will, accordingly, be dismissed with costs.

B. D. B. *Appeal dismissed.*

(1) 17 A. 537.

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Before Mr. Justice Ghose and Mr. Justice Harington.

SURJA PRASAD AND ANOTHER (*Defendants*) *v.* GOLAB CHAND (*Plaintiff*).* [5th and 6th March and 7th May, 1900.]

Hindu Law—Mitakshara family—Alienation of ancestral property by father—Liability of sons for father's debts—Mortgage—Suit by mortgagee against son, for sale of ancestral property—Antecedent debt—Legal necessity—Illegal or immoral purpose—Money-decree—Limitation Act (*XV of* 1877), *art.* 116, *sch. II.*

In the case of a joint Mitakshara family where the father raised money on a mortgage hypothecating certain ancestral family property, and it was not proved that the money was required for payment of any antecedent debt, or that the money was raised or expended for illegal or immoral purposes, or that any enquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred:

Held, that the mortgage security could not be enforced against the son (the father having died), unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question.

Under the above circumstances the mortgage is not binding on the son; but the debt not being proved to have been incurred for immoral or illegal purposes, the mortgagee would be entitled to a money-decree against the defendants, not upon the mortgage security, but upon the simple obligation [763] created by the bond; and a suit for such a relief must, under the Limitation Act, be instituted within six years from the due date of the mortgage bond.

Lachman Dass v. *Giridhur Chowdhry* (1) and *Khalilul Rahman* v. *Gobind Pershad* (2), relied upon.

[N.F., 34 C. 184=5 C.L.J. 441=11 C.W.N. 294; 17 C.W.N. 1022 (1029)=19 Ind. Cas. 878 (880); F., 7 C.L.J. 195 (196); 53 P.R. 1901=62 P.L.R. 1901 (F.B.); R., 26 B. 163 (169); 34 C. 735 (744)=5 C.L.J. 569=11 C.W.N. 613; 19 Ind. Cas. 861 (863)=9 N.L.R. 74 (77); 31 A. 176 (191)=6 A.L.J. 263.]

THE defendants Nos. 1 and 2 are the minor son and the widow of one Chunder Koilash Saran *alias* Lachhanji, governed by the law of Mitakshara.

On the 21st February 1891, Lachhanji borrowed Rs. 5,000 from the plaintiff and his uncle Lalchand—also members of a joint Mitakshara family, for the alleged purpose of instituting a suit against one Salukah Deo Narain and Ram Narain Singh, and for the purpose of meeting his marriage and other necessary expenses, and executed a mortgage bond in favor of the plaintiff and his said uncle Lalchand. The due date of the bond was the 19th February 1892.

Lachhanji died on the 23rd July 1894 leaving the defendants Nos. 1 and 2 as aforesaid.

Lalchand died on the 14th December 1894 without leaving any issue; and the plaintiff, having succeeded to Lalchand's interest in the said mortgage bond, instituted this suit on the 10th March 1898 (*i.e.*, six years after the due date of the bond), against the defendants for recovery of the amount secured by the mortgage and claimed, in the first instance, a decree for sale of the mortgage property, and in the second place, the

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* Appeal from Original Decree No. 456 of 1898, against the decree of Babu Jaduputi Banerjee, Subordinate Judge of Sarun, dated the 24th of September 1898.

(1) 5 C. 855. (2) 20 C. 328.

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sale proceeds proving insufficient to satisfy the decretal amount in full, for sale of other properties belonging to the defendants.

The defendants alleged, *inter alia*, that Lachhanji was a profligate and a man of intemperate habits, that the debt was incurred for immoral purposes and not for any legal necessity of the family, that Lachhanji never intended to institute a law-suit against the aforesaid Salukah and Ram Narain, nor did he perform any marriage ceremony, and that the suit was barred by limitation.

It appears from the evidence adduced before the lower Court that no suit was ever instituted by Lachhanji against the said [764] Salukah and Ram Narain; that there was no sufficient proof of the fact that any money was really required for Lachhanji's marriage (for the second time), which took place some time after the execution of the bond in question; that no inquiry was made by the mortgagee as to the truth of the alleged purposes for which the debt was incurred by Lachhanji, and that the defendants failed to establish that the loan was contracted for illegal or immoral purposes; upon these facts the Subordinate Judge was of opinion that there was a legal necessity for incurring the debt, and gave judgment for the plaintiff.

The defendants appealed to the High Court.

MARCH 5, 6, 1900. Dr. *Rash Behary Ghose*, Babu *Karuna Sindhu Mookerjee*, Babu *Akshoy Kumar Banerjee* and Babu *Surendra Nath Ghosal*, for the appellants.—The liability incurred under the mortgage bond of the 21st of February 1891 not being one for satisfying an "antecedent debt" within the meaning of the decisions in the case of *Lachman Dass* v. *Giridhur Chowdhry* (1), *Khalilul Rahman* v. *Gobind Prosad* (2), *Sadabart Prosad Sahu* v. *Foolbash Koer* (3), the bond cannot be enforced against the defendants, and the debt realized from the ancestral property hypothecated thereby. The bond could only be enforced against them as a simple money-bond, if a suit were instituted within six years from the due date of the bond; but as this suit was instituted after the expiry of six years from the due date, it is barred by limitation under art. 116, sch. II of the Limitation Act.

Babu *Golap Chunder Sarkar* and Babu *Dwarka Nath Mitter*, for the respondent.—The lower Court is right in finding upon the evidence that there was a legal necessity for the mortgage. Even if there was no legal necessity, still the debt not being proved to have been incurred for an illegal or immoral purpose, the mortgage should be held binding on the son. The pious liability of the sons to pay the father's debt was for the first time converted into a legal liability by the decision in the case of *Girdharee Lall* v. [765] *Kantoo Lall* (4). No doubt it was laid down in several earlier cases decided by the Privy Council that to support an alienation by the father he must have first contracted a debt and then in order to pay off that debt he might make a valid alienation of the ancestral property. See *Girdharee Lall* v. *Kantoo Lall* (4), *Suraj Bansi Koer* v. *Sheo Persad Singh* (5), *Deendyal Lall* v. *Jugdeep Narain Singh* (6). The facts of these cases show that there were "antecedent debts" in all of them, and hence their Lordships formulated the proposition of law necessary for those cases, that the alienations made by the father to pay off the antecedent debts were binding on the sons.

(1) 5 C. 855. (2) 20 C. 328. (3) 3 B.L.R. F. B. 31.
(4) 14 B.L.R. 187. (5) 5 C. 148 (171). (6) 3 C. 198.

But it is now settled by the later decisions of the Privy Council [see *Nanomi Babuasin* v. *Modun Mohan* (1)] that a debt contracted by the father, if not tainted with immorality, is binding on the sons from its very inception; then why should not a mortgage made to secure the payment of such debts be also binding on the sons? There is no reason why the debt should be antecedent to the mortgage in order to make it binding on the sons. The sons are bound to pay all debts whether secured or unsecured, provided they were not incurred for illegal or immoral purposes. See the observations of Pigot, J., in *Khalilul Rahman* v. *Gobind Parsad* (2).

1900 MAY 7. — APPELLATE CIVIL. — 27 C. 762.

Cur. adv. vult.

JUDGMENT.

MAY 7, 1900. The judgment of their Lordships was delivered by—

GHOSE, J.—This appeal arises out of a suit instituted by Babu Golab Chand against Lalla Surja Narain, minor son of Chunder Kailash Saran *alias* Lachbanji, for enforcement of a mortgage bond, dated the 21st February 1891, executed by the said Lachbanji in favour of the plaintiff and his uncle Lal Chand for the sum of Rs. 5,000.

We have noticed this mortgage bond in our judgment in **[766]** appeal from original decree No. 397 of 1898 (3), The plaintiff's allegation is that Lalchand died without any male or female issue, and, while living jointly with him (the plaintiff), that he has succeeded to his interest in the mortgage bond in question under the Hindu law, and that he is entitled to enforce the mortgage security against the son of Lachhanji, the latter having died.

The due date of this bond was the 19th February 1892, but the suit was not instituted until the 10th March 1898, that is to say, more than six years after that date. The plaintiff, however, claimed in the first instance, a decree for sale, and in the second place in the event of the sale-proceeds of the mortgaged property being insufficient to discharge his dues in full, he asked that the balance of the decretal money might be realized from other properties of the defendant. The mortgage is said to have been given, as has been stated in our judgment in appeal from original decree No. 397 of 1898, for the purpose of meeting the expenses of a suit to be instituted against Salukha Deo Narain and Ram Narain Singh, and for the purpose of meeting the marriage and other expenses of the deceased. The evidence, however, shows that no suit was instituted against those individuals, nor is the evidence sufficient to show that any money was then required for Lachbanji's second marriage, his first wife having then died, and what "other expenses" there were to be met, we do not know. A question seems to have been raised in the Court below whether the second marriage of Lachhanji had not then already taken place, but the Subordinate Judge was unable to find upon the evidence that this was so. He rather held that the marriage did take place subsequent to the execution of the mortgage bond in question, though he came to no finding as to the precise time the event really happened. We agree with the Subordinate Judge in the conclusion at which he has arrived in this respect; but though the marriage may be taken to have occurred, not before, but after, the date of the mortgage bond in question, the evidence in no way satisfies us that any money was really required for the purpose. It is, however, stated by some of the witnesses on behalf of the plaintiff

(1) 13 I. A. 1 (17, 18). (2) 20 C. 328 (347). (3) *See* 27 C. 724.

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that at the time of the loan in question it was represented that money was required for marriage expenses, as also for meeting the expenses of a suit to be [767] instituted against Salukah Deo Narain and Ram Narain Singh, and that enquiry was made under the orders of the plaintiff's uncle Lalchand, as to the truth of these representations. We have examined the evidence bearing upon this matter, but we are unable to find that any enquiry was made on behalf of the plaintiff and his uncle in this connection, though it is quite possible that representations were made to Lalchand that money was required for the said purposes. The plaintiff seeks to enforce the mortgage security in this case, and he is bound to show that the mortgage is binding upon the defendant. Having regard to the rulings both of the Privy Council and this Court, he could do so by showing that the debts for which the mortgage was given were "antecedent debts," that is to say, antecedent to the transaction in question, but we are unable to find upon the evidence such as it is that this was so. If then the mortgage is not binding upon the defendant, the question is whether the plaintiff is entitled to a decree declaring that the money covered by the bond may be realized out of the whole of the ancestral estate, the debt not being proved to have been incurred for immoral or illegal purposes, and it being antecedent to the suit. If the plaintiff had brought his suit within six years from the time when the bond fell due, there could be no doubt that he would be entitled to the relief which was declared as the proper relief to be granted to a party in the position of the plaintiff in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (1) decided by a Full Bench of this Court, and in the case of *Khalilul Rahman* v. *Gobind Pershad* (2). But the suit having been instituted after the expiry of six years from the due date, we do not think, having regard to the principles laid down in those cases, that the plaintiff is entitled to such relief. A decree made, not upon the mortgage security, but upon the simple obligation created by the bond, is but a money decree, and a suit for such a relief is governed by the six years law of limitation as prescribed by the Limitation Act.

Upon these grounds we modify the decree of the Court below, and decree this appeal with costs in both Courts.

B. D. B. *Appeal allowed.*

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27 C. 768 (P.C.)=27 I.A. 81=4 C.W.N. 555=7 Sar. P.C.J. 699.

[768] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Davey, and Robertson, and Sir Richard Couch.

[*On Appeal from the Court of the Judicial Commissioner of Oudh.*]

JAGGOT SINGH (*Plaintiff*) *v.* BRIJ NATH KUNWAR (*Defendant*).
[15th February and 2nd March, 1900.]

Regulation XI of 1825, *s.* 4, *sub-ss.* 1 *and* 5—*Changes in a river's channel—Rights of riparian owners—Accretion by alluvion distinguished.*

The curent of a river changing its course encroached upon either bank alternately, detaching land from one bank, followed by the effect that land was added to the opposite bank.

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(1) 5 C. 855. (2) 20 C. 328.

The river having taken a course more to the east than its original one, the area of the defendant's village (till then only partly on the western side, inasmuch as the river traversed it throughout) appeared entirely on the west bank. Some land of the plaintiff's village on the eastern side was also carried away, the river continuing its eastward tendency. 1900 MARCH 2.

By another change, in the opposite direction, the current resumed its original channel more towards the west, with the effect that the piece of land that had belonged to the defendant's village, and had been submerged, when on the east bank, during the above change in the river's course emerged in the end on its former site on the east bank. This restored land was identifiable. But the owner of the village on the east bank now claimed it as an accretion by alluvion to his property which it adjoined. PRIVY COUNCIL. 27 C. 768 (P.C.)= 27 I.A. 81= 4 C.W.N. 556=7 Sar. P.C.J. 699.

Held, that the right of property remained in the original owner, the defendant. The owner of the adjoining village on the eastern side could not make out a title to it either under sub-s. 1, under sub-s. 5 of s. 4 of Reg. XI of 1825, or in virtue of any known principle. There was no proof of a custom giving this land to him on account of contiguity, and there had been no gain to him from the river by alluvion within the meaning of the Regulation.

[F., 5 C.L.J. 47 (N); D., 1 M.L.T. 101 (102).]

APPEAL from a decree (21st November 1895) of the Court of the Judicial Commissioner, reversing a decree (5th September 1893) of the Subordinate Judge of Baraich.

This suit was brought by the appellant, the talukhdar of Chakbari, to whom belonged a half share in a village Murwa, in Baraich, situate where the river Gogra flowing from north to south separates that district from the district of Sitapur. The [769] defendant, respondent, was the widow of the late Raja Raghuraj Singh, and was in possession, for her estate as widow, of village Randa opposite to Murwa.

At the time of the settlement the Gogra completely traversed Randa, and touched Murwa only at its extreme south. Afterwards the river, having taken a course more towards the east, submerged land on the east bank, with the result that the whole of Randa for a long period lay on the west bank; and some of the land belonging to Murwa was also detached from that village.

After another change eastward the river returned to its westward course; and the effect was that land that had been part of Randa was again upon the east bank. Upon their former site 2,058 bighas re-appeared. The right to these was now contested. In 1891 an order was made by a Magistrate under s. 145 of the Criminal Procedure Code that the defendant, who had taken possession of these bighas, should retain possession until the plaintiff should have obtained a decree for the proprietary right to them. On the 27th June 1892 the plaintiff sued for possession.

It was the case of both parties to the suit that the Gogra had until the years 1879-1880, in taking its course southward, gone completely through the village Randa, but reaching the southern extremity of Murwa it exactly divided the two villages for a certain length.

The plaint stated that the current, taking a course more eastward between the years 1880 and 1885, transferred from Murwa on the east bank to the west bank a piece of land of which the owner of Randa took possession, claiming title to it under a custom, compliance wherewith was authorized by Reg. XI of 1825. That in the interval between 1886 and 1889 the river, still shifting its course further towards the east, had detached some more land from Murwa, and had transferred it to the west bank where this piece also, as the plaint alleged, had been annexed by the defendant.

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Lastly, it was alleged that when the river, which returned gradually in 1890 and in 1891 to a course more towards the west, had placed on the east bank and against the plaintiff's village [770] the 2,058 bighas now in dispute, the plaintiff became entitled thereto as an alluvial accretion to the land of village Murwa.

The defence was that the defendant had been continuously in possession of the lands in suit, retaining the proprietary right therein.

The issues framed in the First Court were again more clearly stated in the judgment of the appellate Court, and were: (1) Whether the land in suit was added to the plaintiff's village Murwa by gradual accretion; (2) if so, whether it ought to be considered an increment to the plaintiff's estate either under the particular rule laid down in cl. 1 of s. 4, or on the general principles of equity and justice made applicable by sub-s. 5.

The Subordinate Judge found that the land was added by accretion to Murwa. He decreed the right to the 2,058 bighas in favour of the plaintiff, and Rs. 500 for mesne profits for the year 1229 Fasli, holding that the plaintiff was entitled under Reg. XI of 1825; but he did not specify the particular clause which he considered to be applicable to the case.

On an appeal by the defendant, the Judicial Commissioner and the Additional Judicial Commissioner concurred in a judgment in favour of the defendant. They found upon the first issue that the 2,058 bighas had not been accumulated against the east bank by "gradual accession" within the meaning of the Reg. XI of 1825. They referred to cases decided by the Judicial Committee explaining the terms "gradual accession" as a process which seemed to the Commissioners "wholly inapplicable," where, according to the plaint, a recession of the river from east to west, in the course of two years, transferred from the eastern to the western side of the stream two blocks of land, *viz.*, 1,314 bighas belonging to Murwa and 2,058 bighas belonging to Randa." Reversing the decision below they dismissed the suit.

On this appeal, Mr. *C. W. Arathoon*, for the appellant, argued that the judgment of the appellate Court was in error. The Court should have held on a right construction of Reg. XI of 1825, s. 4, sub-ss. 1 and 5, that the claim was maintainable thereunder, and should have found upon the evidence that the land in suit had been gained by the village of Murwa by gradual [771] accretion thereto. As to the explanation of accretion reference was made to *Nogender Chunder Ghose* v. *Muhammad Esuf* (1) and to *Lopez* v. *Muddan Mohun Thakur* (2). It was clearly established by the evidence that the formation of the land against either one bank or the other had been a process occupying long periods of time.

Also, it had appeared that on two occasions the defendant had taken possession of land thrown up by the river over against Randa on the west bank. That fact tended to support an alleged custom or local usage, which would, if prevailing, come in under sub-s. 5. He referred to the usage that the deep stream should be the boundary upon the breaking away of land upon the one side of a river, and the appearance of corresponding land upon the other. There probably would have been further evidence forthcoming as to this usage, had not the defendant obscured the question between the parties by denying that changes had occurred in the course of the current. That question, stated generally, turned

(1) 10 B. L. R. P. C. 406.

(2) 13 M. I. A. 467.

upon the fact that the areas, respectively, of the two villages had undergone repeated changes consequent upon alluvion and diluvion. Alluvion seemed to involve accretion rather than the transfer of land, in its integral portions, and in form identifiable. The condition of identity could not be passed over. It could not be assumed. The probabilities supported in this case the theory of alluvion rather than that alleged for the defence, and had not been displaced by the evidence.

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Mr. *J. H. A. Branson*, for the respondent, was not called upon.

JUDGMENT.

MARCH, 2. The judgment of their Lordships was delivered by

LORD ROBERTSON.—So far as the essential facts are concerned the case of the appellant is clearly disclosed in the plaint. He claims a certain piece of land, measuring 2,058 bighas, and his theory is that this land has become his by alluvion. Yet, while the exigencies of pleading make him describe it as "new alluviated land," it is in this same plaint said to be "land of the defendant's" [respondent's] "village." The 2,058 bighas have, indeed, a perfectly definite history, which in their Lordships' judgment entirely excludes the appellant's claim.

[772] The appellant is proprietor of a village called Murwa; and the respondent is proprietor of a village called Randa. In 1866, which is the commencement of both parties' rights, the river Gogra was flowing in a course which intersected Randa, and the portion of Randa which was on the eastern bank lay between the river and Murwa. This description which was true in 1866 is also true now. It is the fact however that, in the interval between 1866 and 1891, the river had first departed from and then substantially resumed the course in which it now runs, so far as concerns those two properties. The appellant's case is entirely founded on this intervening but now obsolete history.

It appears then that, about the year 1885, the river began to work its way eastward, with the result that it came to have on the western bank of its new course, not only all of Randa that had formerly been on its east bank, but also some part of Murwa. It is said, and it may be assumed, that, while this situation of things lasted, the disjoined part of Murwa was taken possession of by the respondent. But the Gogra did not long adhere to this course and soon began to recede to the west; and by 1891 it once more had to its east, not only the whole of Murwa but (intervening between it and Murwa) the 2,058 bighas now in dispute, which the appellant in his plaint admits to be historically part of Randa. For a time, during the wanderings of the river, this land seems to have been submerged; and the appellant says that it emerged in an altered form not capable of being identified. This disguise has fortunately not misled the appellant himself, or prevented his recognizing the 2,058 bighas as Randa land.

These being the facts, it is manifest that the case does not fall within the well-known chapter of law which treats of the formation of new land, through the gradual and imperceptible washing up of particles by a river or the sea. Nor have we even to deal with the more complicated case in which a piece of land is first disintegrated by water action, and thereafter reintegrated or reformed by water action. The only note of similarity to alluvion to which the appellant could point was that the process of change was so far gradual; but this means merely that the river took several years to change its course. Now the mere fact that a change in a river's course has placed land belonging to A in **[773]** contiguity

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to the lands of B could never deprive A of the lands and transfer them to B. And the proposition maintained by the appellant is by several steps nearer than this to paradox; for he contends that if after temporary aberrations a river at last leaves the land of A *in statu quo ante* it must be held to be an accession to B, his next neighbour. It is superfluous to say that neither the statute law of India nor the general principles of jurisprudence lend the slightest support to such unreasonable conclusions.

The 11th Regulation of 1825, by the first sub-section of s. 4, declares land gained by gradual accession to be an increment of the land to which it is thus annexed; and by the fifth sub-section in all other cases, not specifically provided for in the Regulation, where land is gained by alluvion or by dereliction of a river or the sea, the Court is to be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or, if not, by general principles of equity or justice. It is perfectly plain that neither the specific provision of the first sub-section nor the general principles of equity and justice lend the slightest support to the pretension of the appellant, which is to land that would be gained not from the river but from a neighbour.

So far as local usage is concerned, it is enough to say that no case of such usage is presented on record. What seems really to underlie the appellant's claim is a crude idea that because the respondent once had possession of that part of Murwa, which for the time was transferred to the west side of the river, therefore the appellant ought now to have in property the 2,058 bighas belonging to Randa. No attempt was made to formulate this as a legal proposition.

Their Lordships are of opinion that the judgment of the Judicial Commissioner, concurred in by the Assistant Judicial Commissioner, was right; and they will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant; Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Watkins & Lempriere.*

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27 C. 774.

[774] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Harington.

LALA MAKHAN LAL (*Defendant*) *v.* LALA KULDIP NARAIN AND OTHERS (*Plaintiffs*),* [23rd May, 1900.]

Ejectment—Suit for ejectment—Notice to quit by post—Bengal Tenancy Act (*VIII of* 1885) s. 189—*Mode of service of the notice under the Act—Bengal Government Rule* 3, *chap. I, under s.* 189 *of the Bengal Tenancy Act.*

The plaintiffs served a notice, by post, upon the defendant to quit certain *khud kasht* lands that were alleged to be in his wrongful possession, and subsequently instituted a suit to eject him from those lands:

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* Appeal from Appellate Decree No. 1536 of 1898, against the decree of E. G. Drake-Brockman, Esq., District Judge of Gya, dated the 4th of May 1898, modifying the decree of Babu Baroda Prasanna Shome, Subordinate Judge of that District, dated the 4th of January 1898.

Held, that the notice was bad in law, and the suit for ejectment based upon such a notice must fail. 1900 MAY 23.

Tara Das Malakar v. *Ram Doyal Malakar* (1) referred to.

APPELLATE CIVIL.

27 C. 774.

IT appears that a dispute which existed between the plaintiffs and the defendant concerning the possession of about 44 bighas of *khud kasht* lands in mouzah Makhra in the district of Gya, led to the institution of criminal proceedings under s. 145 of the Code of Criminal Procedure in which the defendant's possession was confirmed, and the plaintiffs were referred to the Civil Court. This order under s. 145 was made on the 10th of March 1894.

On the 2nd of March 1895 (20th Falgoon 1302 F. S.) the plaintiff sent by post, in a registered cover, a notice to the defendant to quit the possession of the said lands in dispute, alleging that the defendant had no right whatsoever to retain possession of the same. On the 5th of March 1895 the said notice was served on the defendant who signed the postal acknowledgment with his own hand, but did not give up the possession of the lands. Thereupon the plaintiffs instituted this suit to eject the defendant from, and to recover *khas* possession of, the said 44 bighas of *khud kasht* lands.

[775] The defendant pleaded that he and his ancestors had been resident raiyats of Makhra for several generations; that in Assar 1298 F. S. the plaintiffs settled the lands in dispute with him and he has since been peacefully cultivating the same; that he should be deemed to have become a settled raiyat of the village; that neither the plaintiffs nor anybody else had any right to eject him unless and until any of the contingencies prescribed by s. 44 of the Bengal Tenancy Act had happened; and that assuming the plaintiffs' right of suit, no valid and legal notice was served on him in accordance with the provisions of the Bengal Tenancy Act and the rules framed by the Government of Bengal under s. 189 of the Act, and that the suit was therefore premature and untenable.

The Subordinate Judge found that the plaintiffs were raiyats and the defendant an under-raiyat as defined in s. 4, cl. (3) of the Bengal Tenancy Act; that no notice would be necessary previous to the suit. And he gave judgment for the plaintiffs.

The District Judge, on appeal, also held that the defendant was an under-raiyat and the provisions of s. 49 of the Tenancy Act would be applicable to this case. He did not, however, agree with the first Court's decision on the issue that notice to quit was unnecessary, but was of opinion that the contention that the notice had not been properly served on the defendant under the rules, was "not of much weight as the defendant received the notice and signed the postal receipt for it;" and he practically upheld the decree of the first Court with some modifications.

The defendant appealed to the High Court.

Babu *Digamber Chatterjee*, for the appellant.—This was a suit for ejectment; the notice to quit having been served on the defendant by post was bad in law, the mode of service not being in accordance with the provisions of the Bengal Tenancy Act and the Rules of the Bengal Government made thereunder (see Rule 3, chap. I of the Rules made by the Government of Bengal under s. 189 of the Bengal Tenancy Act); and upon this ground alone the suit ought to fail: *Tara Das Malakar* v. *Ram Doyal Malakar* (1).

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(1) 2 C.W.N. 125.

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Babu *Saligram Singh* and Babu *Jogendra Chunder Ghose*, for [776] the respondent.—Because the notice was bad in law, the suit should not wholly fail on that preliminary ground.

JUDGMENT.

MAY 23, 1900. The judgment of their Lordships was delivered by

GHOSE, J.—This appeal arises out of a suit for ejectment. It has been found, though the finding has been impeached before us by the learned vakil for the defendant-appellant as based upon no evidence, that the plaintiffs are raiyats and the defendant an under-raiyat. The plaintiffs gave a notice to the defendant to quit, but this notice seems to have been sent to him by post, and was not served upon him in accordance with Rule 3, chap. I of the Rules framed by the Government of Bengal under s. 189 of the Bengal Tenancy Act. The notice must therefore be taken to be bad in law: See *Tara Das Malakar* v. *Ram Doyal Malakar* (1). It follows, therefore, that the suit, as based upon such a notice, must fail, and the plaintiffs are not entitled to obtain ejectment in this case.

In this view of the matter, we refrain from expressing any opinion upon the question whether the plaintiffs have rightly been found to be raiyats and the defendant an under-raiyat.

The appeal will be decreed, and the suit dismissed with costs in all the Courts.

B. D. B. *Appeal allowed.*

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27 C. 776=4 C.W.N. 423.

APPELLATE CRIMINAL

Before Mr. Justice Macpherson and Mr. Justice Hill.

ANOOKOOL CHUNDER NUNDY (*Appellant*) *v.* QUEEN-EMPRESS (*Respondent*).* [20th and 21st February, 1900.]

Trade-mark—User of, and property in—Proof of—Importation and sale of articles with particular marks impressed upon them—Succession by one Bank to business of another—Merchandise Marks Act (*IV of* 1889), s. 3—*Penal Code* (*Act XLV of* 1860), *ss.* 485 *and* 486.

[777] A mark to be a trade-mark must be a mark used for denoting that the goods are the manufacture or the merchandise of a particular person.

The mere fact that a Bank imported and sold gold bars with a particular mark impressed upon them, a mark which was not originally theirs, but belonged to a Bank that had ceased to exist, and where there was no proof of any transfer or assignment of the mark, or that the new Bank succeeded the other in the sense either that it was a continuation of that Bank under another name, or that it succeeded to the business or acquired the good-will of that Bank, was held not to be sufficient to establish that the mark was the trade-mark of the new Bank.

IN this case a search was instituted at the instance of the Sub-manager of the National Bank of India, who had deposed that gold bars were in circulation bearing a counterfeit of the impression on the gold bars imported by his Bank, and that the accused was suspected of being concerned in this. The accused's shop was searched on the 14th

* Criminal Appeal No. 937 of 1899, made against the order passed by Syed Ameer Hossein, Presidency Magistrate of Calcutta, dated the 15th December 1899.

(1) 2 C. W. N. 125.

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August 1899; nothing, however, was found indicating the commission of any offence in connection with the mark of that Bank, but there was found a bar of gold stamped with the words "Chartered Mercantile Bank of India, London and China" in English and Guzrati character, and other words denoting the touch of gold and the names of the London Bullion Brokers, also a stamp or die, which made an impression similar to the impression on the gold bar. It was alleged on behalf of the prosecution that the Chartered Mercantile Bank of India, London and China, used to import from England gold bars impressed with the name of that Bank, and other words denoting the touch of gold and the names of the London Bullion Brokers, that this impression was a well-known mark in the market, and that when that Bank ceased to do business in 1893, the Mercantile Bank of India, as its successor, continued to import gold bars with a precisely similar mark, that, in fact, this mark which was the mark of the Chartered Mercantile Bank of India, London and China, became by transfer, assignment or succession the mark of the Mercantile Bank of India, and that the latter Bank occupied with reference to it exactly the same position as the Chartered Bank had occupied. There was no proof of any transfer or assignment of the mark, or that the Bank succeeded the other in the sense either that it was a continuation of that Bank under another name, or that it succeeded to the business or acquired the good will of that Bank.

[778] The accused was convicted on the 15th December 1899 by the Presidency Magistrate of Calcutta under ss. 485 and 486 of the Penal Code of having in his possession, (*a*) instruments for the purpose of counterfeiting the trade or property mark of the Mercantile Bank of India, Limited; (*b*) for sale or trade a gold bar bearing a counterfeit impression of the trade or property-mark of that Bank.

Mr. *Hill* (with him Mr. *Allen*, and Babu *Boidyanath Dutt*), for the appellant.

Mr. *Dunne* (with him Mr. *W. K. Eddis*), for the Crown.

FEBRUARY 21, 1900. The judgment of the Court (MACPHERSON and HILL, JJ.) was as follows:—

JUDGMENT.

The appellant has been convicted under ss. 485 and 486 of the Penal Code of having in his possession, (*a*) instruments for the purpose of counterfeiting the trade or property mark of the Mercantile Bank of India, Limited; (*b*) for sale or trade a gold bar bearing a counterfeit impression of the trade or property mark of that Bank.

It appears that, on the 14th August, the appellant's shop was searched under a search warrant issued at the instance of the Sub-Manager of the National Bank of India, who had deposed that gold bars were in circulation bearing a counterfeit of the impression on the gold bars imported by his Bank, and that the appellant was suspected of being concerned in this. Nothing was found indicating the commission of any offence in connection with the mark of that Bank, but there was found a bar of gold (Ex. G) stamped with the words "Chartered Mercantile Bank of India, London and China," in the English and Guzrati character, and other words denoting the touch of gold and the names of the London Bullion Brokers: also a stamp or die (Ex. B) which made an impression similar to the impression on Ex. G. Mr. Fidler, the Manager of the Calcutta Branch of the Mercantile Bank of India, Limited, who was a witness for the prosecution, deposed that the mark on Ex. G

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was a counterfeit of the mark on the gold bars imported by his Bank. No one else claimed any interest in that mark. On the 7th [779] November, after all the witnesses for the prosecution had been examined, the appellant was charged under the sections cited with having in his possession instruments for counterfeiting the trade or property-mark of the National Bank of India, Limited, and also a gold bar bearing a counterfeit impression of the trade or property-mark of that Bank. The witnesses for the prosecution were recalled and cross-examined and on the 12th December, after the cross-examination had been concluded, it was discovered that there was what the Magistrate calls a clerical error in the charges, and that the National Bank of India, Limited, had by mistake been inserted for the Mercantile Bank of India, Limited. New charges were then framed with the corrections necessary to meet that mistake. Mr. Fidler was recalled and examined as a witness for the defence, and on the 15th December the appellant was convicted on those charges.

It is contended on those facts that there has been no proper trial, and that the conviction is bad on that ground. It must be conceded that the original charges were most carelessly drawn, but there is no reasonable ground for supposing that the appellant was misled by them. The prosecution was based upon the finding of the articles, Exs. G and B, in his possession ;no one ever suggested that any instrument for counterfeiting the mark of the National Bank of India was found in his possession, and Mr. Fidler's evidence went to show that Ex. G. was a counterfeit of the mark, impressed on the gold bars imported by his Bank.

The matter is not, however, of much importance, as we think the conviction must be set aside on another ground, and that is that it is not proved that the mark in question is the trade-mark of the Mercantile Bank of India, Limited, and, unless this is proved, the conviction cannot stand. It is not attempted to support the conviction on the ground that the mark is a property-mark.

The case rests almost entirely on the evidence of Mr. Fidler, which in substance amounts to this that the Chartered Mercantile Bank of India, London and China, used to import from England gold bars impressed with the name of that Bank, and other words denoting the touch of gold and the names of the London Bullion Brokers, that this impression was a well known mark in the market, [780] and that when that Bank ceased to do business in 1893 the Mercantile Bank of India as its successor continued to import gold bars with a precisely similar mark. In other words that this mark which was the mark of the Chartered Mercantile Bank of India, London and China, became by transfer, assignment or succession, the mark of the Mercantile Bank of India, Limited, and that the latter Bank occupied with reference to it exactly the same position as the Chartered Bank had occupied. It is enough, however, to say that, assuming this to have been the trade-mark of the Chartered Mercantile Bank, there is in the present case no proof of any transfer or assignment of the mark, and no proof that the one Bank succeeded the other in the sense either that it was a continuation of that Bank under another name, or that it succeeded to the business or acquired the good will of that Bank.

Assuming however that this mark, being the trade-mark of the Chartered Mercantile Bank of India, London and China, could after that Bank ceased to do business become by user the trade-mark of the Mercantile Bank of India, there is in this case no sufficient proof of the user necessary to effect that. A mark to be a trade-mark must be a mark *used* for denoting that the goods are the manufacture or the

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merchandize of a particular person and the particular person in this case is according to the charges the Mercantile Bank of India. The prosecution had, therefore, to prove that this mark was used for denoting that the gold bars were the manufacture or merchandize of that Bank. The mark in itself does not denote anything of the kind, and it is not necessary that it should do so. But it was originally used to denote something else, and there is no evidence that it had acquired in the market any other meaning or that it was understood to denote that the gold bars upon which it was impressed were the gold bars imported by the Mercantile Bank of India. Except Mr. Fidler, whose evidence is very vague and does not carry the case far enough, no one who has had anything to do with these gold bars has been examined, and we do not know what the mark was understood by any person other perhaps than Mr. Fidler, to denote. The mere fact that the Mercantile Bank imported and sold gold bars with this mark impressed upon them, a mark which was not **[781]** originally theirs, is not in the circumstances of this case sufficient to establish that the mark was the trade-mark of the Bank and the case is really carried no further than that.

The conviction must, therefore, be set aside. The result is to be regretted as it is impossible to suppose that the appellant was in the possession of the articles for any honest purpose. He has, however, been charged with and convicted of a particular crime, and that crime must, of course, be strictly proved.

D. S. *Appeal allowed.*

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CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

HARI TELANG AND OTHERS (*Petitioners*) *v.* QUEEN-EMPRESS (*Opposite Party*).* [8th February, 1900.]

Security for good behaviour from habitual offenders—Acts committed by persons in performance of duties as burkandazes *in zemindari—Habitual Association—Joint trial—Criminal Procedure Code (Act V of* 1898) ss. 110, 112, 117, 118 *and* 537.

Certain *burkandazes* employed at a *kutchery* of the Bijni Estate, who were alleged to have committed acts of extortion and other acts of oppression in the performance of their duties were called upon to execute bonds for their good behaviour on the grounds :—

(1) That they habitually commit extortion ; (2) that they habitually commit or attempt to commit or abet the commission of offences involving a breach of the peace; (3) that they are dangerous persons so as to render their being at large without security hazardous to the community.

They were tried jointly by the Magistrate under s. 117 of the Code of Criminal Procedure, and each of them was ordered to execute a bond with sureties for his good behaviour for three years.

Held, that even supposing the Magistrate was right in considering that there was habitual association between these persons in regard to the first and second grounds, there certainly would be no such connection between them in regard to their characters so as to make them dangerous persons, and thus to render their

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* Criminal Revision No. 840 of 1899, made against the order passed by F. E. Jackson, Esq., District Magistrate and Deputy Commissioner of Goalparah, dated the 2nd of July 1899.

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being at large without security hazardous to the community, and that proceedings should have been separately taken against each of them.

[782] Section 110 of the Code of Criminal Procedure is not applicable where certain acts amounting to extortion are committed by certain persons in the performance of their duties as *burkandazes* in a zemindari, as it cannot be said that these persons are in the habit of committing extortion as individual members of the community, because if they were discharged by the zemindar or ceased to be in his employ the acts would no longer be committed, it being no longer to their interests to do such acts in the interest of their employer and they certainly would not be likely to commit them in their own private capacities.

The object of enabling a Magistrate to take security for good behaviour is for the prevention and not for the punishment of offences.

[F., 1 C.L.J. 616 (623)=9 C.W.N. 898; D., 6 Bom. L.R. 34.]

IN this case the petitioners were *burkandazes* employed at the Krishnai *kutchery* of the Bijni Estate. The District Magistrate, while in camp at Krishnai in November 1898, received information from certain persons to the effect that the ryots within the Krishnai Tehsil were subjected to oppression by the *kutchery* officials. That extortion was constantly practised, and persons were frequently seized by the petitioners and other *burkandazes* and beaten and confined at the *kutchery*. Proceedings were taken against the petitioners under s. 110 of the Code of Criminal Procedure by the District Magistrate who passed orders under s. 112 of the Code calling on the petitioners to show cause why they should not be called upon to execute bonds with sureties for their good behaviour for two years, on the grounds (1) that they habitually commit extortion, (2) that they habitually commit or attempt to commit or abet the commission of offences involving a breach of the peace; (3) that they are dangerous persons so as to render their being at large without security hazardous to the community. Separate proceedings were drawn up in respect of each of the petitioners. They were, however, tried jointly by the Sub-Divisional Magistrate of Goalpara, who, on the 30th of March 1899, ordered each of the petitioners under s. 118 of the Code of Criminal Procedure to execute a bond for Rs. 100 each. with two sureties for Rs. 100 each, for his good behaviour for three years. Against this decision the petitioners appealed to the District Magistrate of Goalpara and contended *inter alia* that they had been prejudiced in having been tried jointly under s. 117 of the Code of Criminal Procedure. The District Magistrate however rejected their appeal on the 2nd of July 1899.

[783] Babu *Bycunt Nath Das*, for the petitioners.

JUDGMENT.

FEBRUARY 8, 1900. The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

PRINSEP, J.—The petitioners have been required to give security for good behaviour and their appeal has been dismissed by the District Magistrate. They were all three tried together in the same proceedings. In consequence of this irregularity and because we had reason to believe, as represented to us, that the evidence did not justify the order, this rule has been granted to consider the case. Proceedings were taken under s. 110 on three grounds, *first* that the petitioners habitually commit extortion; *secondly* that they habitually commit or attempt to commit or abet the commission of offences, involving a breach of the peace; and *third* that they are dangerous persons so as to render their being at large without security hazardous to the community. Although separate proceedings were drawn up in respect of each of these persons, they

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have been tried jointly. Objection was taken on this ground before the District Magistrate on appeal, and he held that under the terms of s. 117, sub-s. 4, the proceedings could have been jointly conducted against all the three persons, because they were habitually associated together, and acted together in the interests of their Master, the zamindar. But even supposing that the Magistrate was right in considering that there was habitual association between the three persons in regard to the first and second points mentioned, there certainly would be no such connection between them in regard to their characters so as to make them dangerous persons, and thus to render their being at large without security hazardous to the community. We think, therefore, that the proceedings should have been separately taken against each of these persons. We have consequently considered the evidence on the record in order to ascertain whether this irregularity, to use the words of s. 537 of the Code of Criminal Procedure "has in fact, occasioned a failure of justice." From this evidence, however, it seems that s. 110 is not applicable to the case set up. The acts of the petitioners, though they might amount to extortion, would not be such as to make them liable to give security for good behaviour by reason of their habitually [784] committing extortion. The evidence shows that certain acts amounting to extortion were committed by these persons in the performance of their duties as *burkandazes* in a certain zamindari. No doubt, they may have been liable to punishment on conviction in a regular trial for any of these acts, and we think that that was the proper mode of dealing with the case, but it cannot be said that they have habitually committed extortion, by which, we understand, is meant that they are in the habit of committing extortion as individual members of the community, because, if it should so happen that they were discharged by the zamindar or cease to be in his employ, no doubt the acts of the description stated by the witnesses for the prosecution would no longer be committed by them, for it would no longer be their interest to do such acts in the interest of their employers and they certainly would not be likely to commit them in their own private capacities. We think, therefore, though with some reluctance, that this is not a case in which security for good behaviour can properly be required from the petitioners. It seems to us rather that the proper way of dealing with this case, if the Magistrate wishes to put an end to the unhappy condition of the tenantry in this zamindari, would be to prosecute these servants of the zamindar or possibly those under whose orders they act for specific acts of oppression. We find from the Magistrate's judgment that he has not considered this case except in regard to the point already noticed, and that his order is not founded on the second or third points on which the proceedings were taken. We are informed by the Magistrate's judgment that two persons, apparently in the same service as the petitioners, were at the time of his delivering that judgment under trial for offences of extortion. If this order requiring the petitioners to give security for good behaviour be maintained, as there is nothing to prevent the prosecution of the petitioners for the acts of extortion regarding which this order was passed, the petitioners would in such a trial be very seriously prejudiced, by an order for security for good behaviour against them. The object of enabling a Magistrate to take security for good behaviour is, we may add, for the prevention and not for the punishment of offences. The rule is made absolute.

D. S. *Rule made absolute.*

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27 C. 785= 4 C.W.N. 562.

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[785] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

JOYANTI KUMAR MOOKERJEE, 1st *Party* (*Petitioner*) *v.* J. B. MIDDLETON, 2*nd Party* (*Opposite Party*).*
[20th April, 1900.]

Criminal Procedure Code, s. 144—*Dispute in respect of colliery—Order under s.* 144—*Prohibition to both parties from exercising right of possession—Proceedings under s.* 145 *of the Code of Criminal Procedure—Date of possession—Code of Criminal Procedure* (*Act V of* 1898), *ss.* 144, 145, 146.

On the 10th of November 1899, the Magistrate passed an *ex parte* order under s. 144 of the Code of Criminal Procedure, by which both parties to a dispute were prohibited from exercising any right of possession in respect of a colliery. Subsequently proceedings under s. 145 of the Code were instituted in respect of the same colliery and between the same parties. On the 29th of January 1900, the Magistrate, having found that the second party had been in possession on the 10th of November 1899, passed an order declaring them to be in possession.

Held, that the proper way of dealing with this case in interpreting the Magistrate's order was to hold that, whereas by reason of the operation of his order under s. 144 of the Code of the 10th of November 1899, no evidence could be offered to show the possession of either party from that date up to the 29th of December, he was consequently obliged to ascertain the possession immediately before this order and to regard his intervention as an attachment suspending the previous possession whatever it might be, but that, at the same time, the former possession continued, and although the lawful exercise of its rights had been forbidden for a time, the possession had never ceased to exist.

That the order of the Magistrate was correct.

[R., 13 Cr.L.J. 23=13 Ind. Cas. 215=22 M.L.J. 154=10 M.L.T. 573; 15 Cr.L.J. 509=24 Ind. Cas. 597=26 M.L.J. 208=(1914) M.W.N. 352.]

ON the 10th of November 1899, the Magistrate of Gobindpur, being satisfied from a police report and from oral evidence that a dispute in respect of a colliery known as Gansadi Mauza existed between the first and second party, and that a breach of the peace was likely to ensue, passed an *ex parte* order under s. 144 of the Code of Criminal Procedure by which both parties were prohibited from exercising any right of possession there and from doing anything likely to cause a breach of the peace. On the 29th of December 1899, the second party presented a [786] petition stating that he was informed of the first party's intention of taking forcible possession of Gansadi on the 10th January 1900, the date upon which the injunction would expire, and praying that he might be excluded from the operation of the order of the 10th of November or, failing that, a proceeding under s. 145 of the Code of Criminal Procedure might be instituted. The Magistrate ordered a proceeding under s. 145 to be drawn up and subsequently on the 29th of January 1900 having found that the second party was in possession of the colliery on the 10th of November 1899, the date when the injunction was issued, ordered that the second party be declared to be in possession of Gansadi Mauza, until evicted therefrom in due course of law, and he forbade all disturbance by the first party, or any one on their behalf of such possession, until such eviction.

Mr. *Mehta* (with him Babu *Nolini Nath Sen*), for the petitioner.

* Criminal Revision No. 176 of 1900, made against the order passed by A. J. Chotzner, Esq., Joint Magistrate of Gobindpur, dated 29th of January 1900.

Mr. *Garth* (with him Babu *Jyati Pershad Sarbadhicari*), for the opposite party. 1900 APRIL 20.

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JUDGMENT.

APRIL 20, 1900. The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—The matter before us relates to an order passed under s. 145 of the Code of Criminal Procedure holding that Mr. Middleton was in actual possession of the colliery in dispute and should be so retained in possession until the matter in dispute had been settled by a competent Court.

The objection taken on which the rule was granted was that the Magistrate did not find actual possession on the 29th of December, the date on which he passed an order under s. 145 (1) for taking proceedings under that section, but that he found possession immediately before the 10th of November, the date of the order that he had passed between the parties under s. 144 of the Code of Criminal Procedure.

No doubt under s. 145 it is incumbent on a Magistrate ordinarily to find actual possession at the date of his passing an order under sub-s. 1 and the proviso to sub-s. 4 permits a Magistrate to consider previous possession within two months [787] before such date under the circumstances stated therein. It has been contended before us, and we think no objection can be raised to this argument that the circumstances of this case do not come within the terms of that proviso. It cannot be disputed that the legislature could not have had in contemplation a case such as the present. The Magistrate has found that, by reason of the order under s. 144 passed on the 10th November, the possession of neither of the disputing parties existed from that dato up to the date of the proceedings taken under s. 145, and consequently, he has proceeded to consider the possession before the date of that order under s. 144, in order to determine who was lawfully in possession at that time, for it may be justly considered that the exercise of any rights on such possession was merely suspended by the order under s. 144. Some recent cases have shown to this Court how disastrously an order under s. 144 may operate in regard to the exercise of private rights of parties and the present case may be added to the list of those cases. Here the order recites that there was a dispute between the parties likely to cause a breach of the peace in regard to the possession of this colliery, and it was, accordingly, ordered that " neither party should exercise any act of possession there or do anything likely to lead to a criminal breach of the peace." The result of that order has been practically an attachment of the property, and it was not until the 29th December that the successor of the Magistrate, who had passed the order under s. 144, realized the necessity for proceedings under s. 145.

We have found in some cases that Magistrates pass orders under ss. 144 and 145 simultaneously. In the present case they were not passed simultaneously but consecutively, and we would draw attention to the terms of s. 145, which, if properly applied, provide a perfect remedy for any disturbance of this description relating to the possession of land, inasmuch as s. 145 permits a Magistrate, who may find the case to be one of emergency, to attach the subject of dispute pending his decision under that section. An order under s. 144, it should be remembered, can be passed *ex parte* also only in a case of emergency, but it remains in force only for two months, at the end of which time the cause of dispute and its probable [788] consequences will still remain. If, therefore, a Magistrate acts at once

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under s. 145, and, if necessary, attaches the land—the subject-matter in dispute—he acts more effectively than by an order under s. 144, because he puts himself into a position to settle the dispute between the parties, which is likely to disturb the public peace.

Mr. Mehta, who appears for the petitioner, contends that inasmuch as the Magistrate could not find actual possession at the time of his order under sub-s. (1) of s. 145, he was bound under s. 146 to attach the property. We cannot agree in this. The result would be to put out of possession one of the parties at all events, who had held possession at least up to the date of the order, under s. 144—an order which is declared to be only of temporary operation, and which could be passed only on an emergency to prevent an imminent breach of the peace. It might so happen that, if proceedings under s. 145 had not been taken, and when the order under s. 144 had, by lapse of time, ceased to have effect, the party in possession would be entitled to exercise his lawful right. But on the argument addressed to us by reason of the proceedings under s. 145, he would not be liable to prove his possession by exercise of such rights at the time that such proceedings were taken, because he had been restrained by the order under s. 144, and on this argument he would consequently be deprived of his possession. Thus it would follow that, by reason of the intervention of the Magistrate to prevent a breach of the peace, lawful possession would be disturbed. That could never be the intention of the Legislature. Section 146 was, in our opinion, intended to apply to a case in which, on the evidence before him, a Magistrate could not find possession with either of the parties. It seems to us that the proper way of dealing with this case in interpreting the Magistrate's order is to hold that, whereas by reason of the operation of his order under s. 144 of the 10th November no evidence could be offered to shew the possession of either party from that date up to the 29th December, he was consequently obliged to ascertain the possession immediately before this order, and to regard his intervention as an attachment suspending the previous possession whatever it might be, but that at the same time the [789] former possession continued, and, although the lawful exercise of its rights had been forbidden for a time, the possession had never ceased to exist. In this view we think that the order of the Magistrate is correct and this rule must be discharged.

D. S. *Rule discharged.*

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APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

PATIT SHAHU (*Defendant No.* 1) *v.* HARI MAHANTI AND OTHERS (*Plaintiffs*).* [27th June and 3rd July, 1900.]

Landlord and tenant—Sale of tenure for arrears of rent—Act X of 1859—*Non-attachment and non-publication of sale proclamation—Civil Procedure Code* (*Act XIV of* 1882), *s.* 311—*Non-registration of purchase in the landlord's* sherishta.

There is no provision in Act X of 1859 under which the sale of a *jote* in execution of a rent decree is liable to be set aside on the ground of non-attachment and non-proof of publication of the sale proclamation.

In a case governed by Act X of 1859, it was *held* that a person, who had purchased a transferable *jote*, but who did not get his name registered in the landlord's *sherishta*, had no *locus standi* against a subsequent auction-purchaser of the *jote* in execution of a decree obtained against the recorded tenant, and had no right to impugn the title of the auction-purchaser under the sale.

Sham Chand Kundu v. *Brojonath Pal Chowdhry* (1) followed.

[F., 1 Ind. Cas. 257; F. & R., 10 Ind. Cas. 899 (901); R., 37 C. 823 (830)=12 C.L.J. 158=14 C.W.N. 905=6 Ind. Cas 605; 13 C.L.J. 613=16 C.W.N. 64=9 Ind. Cas. 1001 (1003); 22 Ind. Cas. 916; D., 16 C.L.J. 141=17 Ind. Cas. 126 (127).]

A CERTAIN quantity of *tankian bazeafti* land, forming a saleable under-tenure, situate at Basanta patra, in the southern division of the Cuttack District, belonged to one Kulamoni Mahanti, the defendant No. 2. He sold a portion of the land to his relations Rahash Das, the defendant, No. 3, and Paramananda Behara, father of Modan Behara, the defendant No. 4.

The defendants Nos. 2 and 3 and the father of defendant No. 4, it was alleged, sold the land to the plaintiffs, Hari [790] Mahanti and Bauri Bandhu Das, for Rs. 475, by separate registered *kobalas*, dated the 8th April 1897. The plaintiffs, however, did not get their names registered in the landlord's *sherishta.* The defendant No. 5, who is the Raja of Puri, brought a suit, as landlord, against the defendant No. 2, the recorded tenant, for rent in respect of the land in dispute, and obtained an *ex parte* decree. In execution of that decree, the land was sold and purchased by one Patit Shahu, the defendant No. 1, on the 21st December 1897, for Rs. 75.

The plaintiffs brought the present action for the declaration of their title by purchase to the land in dispute, for the further declaration that the sale of the 21st December was collusive, having been brought about by the suppression of the sale proclamation, &c., and therefore null and void, for confirmation of their possession, for declaration that the plaintiffs were entitled to pay up the decree for rent, and for other reliefs.

The defendant No. 1, amongst other things, alleged that the *kobalas* under which the plaintiffs claimed the land in dispute were *benami* and collusive transactions, that the allegations by the plaintiffs as to the suppression of the sale proclamation, &c., were false, that the sale in execution of the rent decree was not brought about by fraud, and that

* Appeal from Appellate Decree No. 2321 of 1898, against the decree of W.B. Brown, Esq., District Judge of Cuttack, dated the 29th of August 1898, confirming the decree of Babu Kishori Lal Sen, Munsif of Puri, dated the 29th of March 1898.

(1) 12 B.L.R. 484=21 W.R. 94.

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the said defendant had been duly put in possession of the property after confirmation of the sale.

Upon these pleadings several issues were framed by the Munsif, and amongst them the following:—

Fourth (*a*). Whether the defendant No. 5 is only the assignee of rent of the village where the disputed holding is situate? What is his status?

(*b*) If only an assignee, could he bring the tenure in dispute to sale?

(*c*) And what is the effect of the sale?

The Munsif found that the *kobalas* under which the plaintiffs claimed were *bona fide* transactions, that the land was held under the Raja as landlord, that the Raja was only a co-sharer, and the decree must be taken as obtained by a co-sharer landlord, and as capable of execution under s. 108 of Act X of 1859. He also [791] found that there was no publication of the sale notification on the spot, and that, therefore, the sale in execution of the rent decree was a nullity, and further that the defendant No. 1 was not an innocent purchaser, he having tried to purchase the land at the time the plaintiffs did so, and, having been outbid by the plaintiffs, and having thus a sufficient motive to bring about the sale by suppression of the sale proclamation. Accordingly the Munsif set aside the sale, and directed that the defendant No. 1 should vacate the property, and that, *as between him and the plaintiffs*, the latter should recover possession of it. The Munsif, however, refused to grant the plaintiffs the other reliefs prayed for, *e.g.*, declaration of their title, confirmation of possession, &c., on the ground that they had not got their names registered in the landlord's *sherishta* as required by s. 27 of Act X of 1859.

The defendant No. 1 appealed to the District Judge, who dismissed the appeal, holding that no sale proclamation was published. The District Judge further held that, as the defendant No. 5 was a co-sharer landlord, the rent decree obtained by him should have been executed by the mode prescribed by the Civil Procedure Code, and, as there was no attachment in the present case, the sale would seem to be invalid on that ground also.

The defendant No. 1 thereupon appealed to the High Court. The appeal came on for hearing on the 27th June 1900.

Babu *Umakali Mukerjee*, for the appellant.
Babu *Monmohun Dutt*, for the respondent.

Cur. adv. vult.

JULY 3, 1900. The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

JUDGMENT.

In this suit the plaintiffs sue to have it declared (1) that a sale under Act X of 1859 of a certain under tenure, at which the defendant No. 1 purchased it, be declared null and void; (2) that the plaintiffs have a good title to the tenure; (3) and that their possession of the same be confirmed.

[792] The tenure originally belonged to the defendant No. 2, who sold portions of it to defendant No. 3, and the father of defendant No. 4. The plaintiffs subsequently purchased it for Rs. 475, but they never got their names registered in the landlord's *sherishta*.

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The landlord, who is the Raja of Puri, then sued the original tenant, defendant No. 2, got a decree, and in execution put the tenure up to sale, at which it was bought by defendant No. 1. Hence this suit.

The first Court found (1) that the plaintiffs were not entitled to a declaration of their right by purchase, for they had not registered their names in the landlord's *sherishta*; (2) that the sale, at which the defendant No. 1 purchased, was invalid; (3) that the plaintiffs were not entitled to a decree for confirmation of possession; and (4) that the plaintiffs could not be declared entitled to pay the decree for rent, which the defendant No. 5 had obtained against the defendant No. 2.

The defendant No. 1 appealed to the District Judge. Before him it seems to have been argued that the sale under Act X of 1859 was a good sale, but the Judge considered it to be null and void (1) because the sale proclamation had not been duly published; (2) because the decree was one obtained by a co-sharer, and should, therefore, have been executed in the mode prescribed by the Civil Procedure Code, and as there was no attachment in this case, the sale would seem to be invalid on that ground also.

The defendant No. 1, appeals, and on his behalf it has been contended that the want of attachment and sale proclamation are mere irregularities, which do not vitiate the sale. We are inclined to take this view of the matter. The non-attachment and the non-proof of publication of the sale proclamation might be very serious matters, if this were an application under s. 311 of the Civil Procedure Code. But this is not such an application, and we do not think that the plaintiffs can have the sale set aside on the ground of such irregularities. There is no provision in Act X of 1859 which entitles them to have the sale set aside on such grounds.

But there is a more serious objection to the suit, and that is that on the Munsif's findings the plaintiffs are nobodies. The Munsif [793] has refused them the declaration sought for by them as to their title by purchase. The plaintiffs have been held not to be tenants of the land, for they have not registered their names in the landlord's *sherishta* and have not been recognized by him. They have, therefore, no *locus standi* and no right to impugn the defendant's purchase of the *jote*. See *Sham Chand Kundu* v. *Brojonath Pal Chowdhry* (1).

Their suit should therefore be dismissed.

For these reasons we decree this appeal and dismiss the plaintiffs' suit.

This order carries costs in all Courts.

M. N. R. *Appeal decreed.*

(1) 12 B. L. R. 384=21 W. R. 94.

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APPELLATE CIVIL.

27 C. 793.

27 C. 793.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

RAJ NARAIN MITTER, RECEIVER TO THE PAIKPARA ESTATE (*Plaintiff*) *v.* EKADASI BAG (*Defendant*).* [5th December, 1899.]

Right of suit—Jurisdiction of Civil Court—Obstruction to public way—Suit by zemindar for removal of obstruction—Special damage—Special inconvenience—Cause of action.

No suit lies for the removal of an obstruction to a public way, unless the plaintiff proves special damage from the obstruction; and this equally applies, whether the plaintiff is a zemindar or any ordinary member of the community.

[R., 22 Ind. Cas. 916.]

THE plaintiff, as receiver of the Paikpara estate, brought this action on the allegation that the defendant, by erecting a pucca wall and a hut on a public road running through Mouza Gopalpore appertaining to the said estate, had almost closed and blocked up the road. The suit was for a declaration that the land encroached on by the defendant was a part of a public road within the said estate, and for recovery of *khas* possession of the land after removal or demolition of the structures raised.

The defendant, amongst other things, contended that the [794] suit was not maintainable at the instance of the plaintiff, unless any special inconvenience to him was shown.

The Munsif found upon the evidence that the defendant had made the encroachment complained of, and decreed the suit.

Upon appeal, the Subordinate Judge, while agreeing with the Munsif as to the fact of the alleged encroachment, held that the suit was not maintainable, without proof of any special inconvenience to the plaintiff caused by the obstruction complained of. The Subordinate Judge went on to observe :—

"It has been held in the case of *Baroda Prosad Mostafi* v. *Gora Chand Mostafi* (1), that a suit will not lie for obstructing a public road without showing any particular inconvenience to the plaintiff in consequence of the obstruction. Sir Barnes Peacock, Chief Justice, observed in this case : 'The plaintiff sues defendant for obstructing a public road, without showing that he has sustained any particular inconvenience in consequence of that obstruction. If he can maintain this suit, any member of the public can do so, and the defendant may be ruined by innumerable actions by persons who have not sustained a farthing of damages. It is said that the plaintiff has a right to sue, because he was one of the persons, who dedicated the road to the public; but it is not because he gave the road to the public that he is necessarily entitled to be the guardian of the public and to sue whenever there is any obstruction to the public which causes him no inconvenience beyond that which is sustained by every other member of the public.

"In the case of *Ramtarak Karati* v. *Dina Nath Mondal* (2), it has been held that a suit for declaration of right of way by a public road will

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* Appeal from Appellate Decree No. 1171 of 1898, against the decree of Babu Chandi Charan Sen, Officiating Subordinate Judge of Midnapur, dated the 10th of March 1898, reversing the decree of Babu Kailash Chunder Sen, Munsif of Tamlukh, dated the 31st of May 1897.

(1) 3 B.L R.A.C. 295=12 W. R. 160. (2) 7 B.L.R.A.C. 184.

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not lie, where there is no allegation of special injury or inconvenience to the plaintiff. In this case, Mr. Justice Glover cited the case of *Pyari Lal* v. *Rooke* (1) 'in which it was laid down that a Civil Court had no jurisdiction to enquire abstractedly into a public right, otherwise than as collaterally to a suit arising out of a private injury; and again, in the case of *Hira Chand Banerjee* v. *Shama Charan Chatterjee* (2), it was laid down that any question as to the opening or closing of a public road belongs to the Criminal, and not the Civil Court, and that such question can only be enquired into in a Civil Court as ancillary to the question whether or not any damage has been done to the plaintiff.'

[795] "In the case of *Bhugeeruth Dass* v. *Chundee Churn* (3), it was held by Mr. Justice Kemp that no one has a right to sue in respect of the obstruction of a public road, even if he dedicated that road to the public, without showing that he has sustained particular inconvenience in consequence of the alleged obstruction.

"The High Court of Bombay, in the case of *Satku Valad Kadir* v. *Ibrahim Valad Mirza* (4), having very exhaustively discussed this question of law, arrived at the conclusion that no person can maintain a Civil suit in respect of obstruction in the public road, unless he can prove some particular damage to himself personally in addition to the general inconvenience occasioned to the public.

"But the High Court of Allahabad, in the case of *Tota* v. *Sardul Singh* (5), held that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without shewing special injury to himself beyond that suffered by any member of the public, does not apply to a zemindar who or whose predecessor in title had dedicated to the public the road over his zemindari land. This ruling is no doubt in conflict with the several rulings of the High Court of Calcutta which I have quoted in the preceding part of this judgment. In the case of *Baroda Prosad Mostafi* v. *Gora Cnand Mostafi* (6), Sir Barnes Peacock, Chief Justice, held that a donor does not by dedicating a thing to the public necessarily become a guardian of the public *quoad* that thing: and in the case of *Bhugeeruth Dass* v. *Chundee Churn* (3), Mr. Justice Kemp held that no one has a right to sue in respect of the obstruction of a public road, even if he dedicated that road to the public, without showing that he has sustained particular inconvenience.

"In the case of *Tota* v. *Sardul Singh* (5), Sir John Edge, Chief Justice, held that a zemindar in giving the public right of road or way over his land, 'does not give the public or any one else a right to interfere with the soil of the road, as for instance, by building a house upon it * *.' In such a case the zemindar has, in common with the public, the right to use the road as a road, and over and above it, he has a right to the soil in the road, which he had never given to the public. In an action of this kind, the zemindar does not sue as a guardian of the public, but in respect of an interference of his own right of property. But Sir Barnes Peacock observed that the persons who dedicate a road to the public have no greater **[796]** right to the road dedicated by themselves than any member of the public. Sir John Edge, in his attempt to distinguish the case instituted by the zemindar from the case of *Baroda Prosad Mostafi* (6) decided by Sir Barnes Peacock, observed: 'In the case decided by Sir Barnes Peacock that learned Judge seemed to think that if the plaintiff in that case were

(1) 3 B.L.R.A.C. 305=12 W. R. 199. (2) 3 B.L.R. A.C. 351=12 W.R. 275.
(3) 22 W.R. 463. (4) 2 B. 457.
(5) 10 A. 553. (6) 3 B.L. R. A. C. 295=12 W. R. 160.

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allowed to maintain his action, all the public would have a general right to maintain an action against the defendant. I think that learned Judge overlooked the distinction between the rights of the public and the rights of the zemindars.' But it does not appear that there is any distinction between the dedication made by the ordinary donor and the dedication made by the zemindar. If an ordinary donor by dedicating a piece of land for the purpose of being used as a public road loses all his rights to it except the right of using it as a road, then there is no reason why in a case of similar dedication by a zemindar it is to be presumed that he reserved to himself a portion of his private rights of property.

"In support of the view taken by Sir John Edge in the case of *Tota* v. *Sardul Singh* (1), his Lordship cited the case of *Dovaston* v. *Payne* (2), in which it has been held that 'the property of a highway is in the owner of the soil, subject to an easement for the benefit of the public.' But it is to be borne in mind that the rights and position of a proprietor of land in England are quite different from the rights and position of the proprietors of land in India called zemindars. Property in the English sense of the term, that is, a right to the exclusive use and absolute disposal of the soil, can hardly be claimed by the zemindars in this country. Consequently it is doubtful whether the principle laid down in these English cases would be made applicable to a case of this kind. But even if it is conceded that the principle laid down in the case of *Dovaston* v. *Payne* (2) and *R.* v. *Pratt* (3) is applicable to this case, and that a zemindar grantor or donor in dedicating land for the purpose of being used as a public road reserves to himself the right to the soil, still the case would not be maintainable in consequence of the special law of procedure prescribed for the trial of this class of cases.* * *.

"It is for these reasons that I find that the present suit is not maintainable at the instance of the plaintiff and it should therefore be dismissed."

The plaintiff appealed to the High Court.

Babu *Mohun Chand Mitter*, for the appellant.

[797] Babu *Lal Mohun Dass* and Babu *Sarat Chundra Dutt*, for the respondent, were not called upon.

The judgment of the High Court (RAMPINI and WILKINS, JJ.) was as follows:—

JUDGMENT.

This is an appeal against a decision of the Subordinate Judge of Midnapur, dated the 10th March 1898.

The suit is one relating to an obstruction on a public road. It is said that the defendant has erected a portion of a wall and a portion of a hut on a public thoroughfare; and the plaintiff sues for their removal.

The lower appellate Court has found that the plaintiff has not proved any special damage or inconvenience; and, therefore, the road being a public road, he has his remedy under the Code of Criminal Procedure and is not entitled to sue in a Civil Court.

We think there is no ground for interfering with the decision of the Court below.

The learned pleader for the appellant has argued at very great length that his client, being a zemindar, has a right of ownership in the land; and he has relied upon certain cases decided by the Allahabad High Court

(1) 10 A. 553. (2) Smith's L. C. Vol. II, p. 154. (3) 4 E. & B. 860.

and upon certain English authorities. We are of opinion, however, that these decisions of the Allahabad High Court and the English authorities he has cited do not bind us. The law current in this province, and which we are bound to administer, is as laid down in the case cited by the learned Subordinate Judge, namely, that of *Baroda Prosad Mostafi* v. *Gora Chand Mostafi* (1). We think that the Subordinate Judge has very correctly laid down the law as current in this province, which is to the effect that in a road which is a public thoroughfare, unless the plaintiff proves special damage from the obstruction, he is not entitled to bring a suit. This equally applies, whether he is a zemindar or any ordinary member of the community.

The only case decided by this Court which can at all be said to be in favour of the contention of the pleader for the appellant [798] is the case of *Jaggamoni Das* v. *Nilmoni Ghosal* (2). But that was a perfectly different case from the present one. That was a case with regard to a bathing *ghat* in which it was held that the zemindar had only granted an easement to the public, but had not dedicated the *ghat* to them; and that the *ghat* was not a public thoroughfare within the meaning of s. 521 of the Code of Criminal Procedure (Act X of 1872). That being so, it has no application to the present case. For these reasons we think there is no ground to interfere with the decision of the lower appellate Court and we dismiss this appeal with costs.

M. N. R. *Appeal dismissed.*

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27 C. 798.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

JHUMUCK JHA (*Complainant*) v. PATHUK MANDAL AND OTHERS (*Accused*).* [7th May, 1900.]

District Magistrate, power of, to pass orders in cases before Subordinate Court without transfer to his own Court—Judicial enquiry before issue of process, legality of—Code of Criminal Procedure, ss. 192, 202, 203 *and* 204.

Held, where the complaints were not made to the District Magistrate, nor had the cases based on those complaints been withdrawn to his Court by any order, but were in the Court of a Joint Magistrate, who had examined the complainants, that the District Magistrate was not justified in interposing in the trial of the cases and had no authority under the law to pass any orders in those cases.

That even if the cases had been removed by the District Magistrate to his own Court for trial it was very questionable whether the District Magistrate could pass orders directing a judicial inquiry by another Magistrate before the issue of processes so as to postpone the trial.

[D., 39 C. 119 = 13 Cr. L.J. 433 (434) = 15 Ind. Cas. 65.]

IN this case it appeared that several complaints were made to the Joint Magistrate of Durbhanga on behalf of certain landlords against a large body of tenants charging them with [799] offences, which may be described as criminal trespass or assault, or rioting. After examination

* Criminal Revision Nos. 274 to 281 of 1900, made against the order passed by H. Wheeler, Esquire, District Magistrate of Durbanga, dated the 27th of March 1900.

(1) 3 B. L. R. A. C. 295 = 12 W. R. 160. (2) 9 C. 75.

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of the complainants the Magistrate in one, if not more, of these cases ordered process to issue, but immediately afterwards cancelled that order dealing with all these cases by another order referring them all to the District Magistrate, who thereupon ordered a judicial inquiry to be held in each of these cases by Subordinate Magistrates deputed for that purpose.

Mr. *Garth* (with him Babu *Buldeo Naraīn Singh*), for the petitioner.

JUDGMENT.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—These rules may be dealt with simultaneously as the matters involved are the same in all of them. It appears that some eight complaints were made to the Joint Magistrate of Durbhanga on behalf of the landlords against a large body of tenants charging them with offences, which may be shortly described as criminal trespass or assault and possibly rioting. After examination of the complainants the Magistrate in one, if not more, of these cases ordered processes to issue, but immediately afterwards cancelled that order dealing with all these cases by another order referring them all to the District Magistrate. The District Magistrate thereupon ordered a judicial inquiry to be held in each of these cases by subordinate Magistrates deputed for that purpose, The question is whether the District Magistrate had any authority under the law to pass any orders in these cases, seeing that the complaints were not made to him nor had the cases based on those complaints been withdrawn to his Court by any order, and next whether, even if the District Magistrate had jurisdiction to pass any order on these complaints, he was authorized to pass the order or orders for judicial inquiry, thus suspending the issue of the usual processes for the attendance of the accused and the trials.

We have received a letter from the District Magistrate in explanation of the matters stated in the affidavit, and the petition presented to us on which these rules have been granted. We are unable from that explanation to ascertain clearly with whom [800] the distribution of business within what is known as the *Sudder* Sub-Division of Durbhanga rests. The Joint Magistrate undoubtedly had jurisdiction to receive complaints under s. 191 of the Code of Criminal Procedure, and therefore, we may take it that, unless any complaint so made to him had been withdrawn from his Court, and the case had been made over to another Magistrate by an order under s. 192, the Joint Magistrate would have jurisdiction to deal with case under ss. 202, 203 and 204. There is no order that has been brought to our notice by which the District Magistrate has withdrawn these cases to his own Court, or has distributed them amongst any other Subordinate Court. It seems that by some executive order the District Magistrate had directed that all cases between these parties should be sent to him as he wished to see them, and for this purpose it would seem that these cases were sent to the District Magistrate. But this order did not justify the District Magistrate interposing in the trial of these cases, unless he thought it proper to remove them to his own Court, and we cannot find that it has been anywhere stated that such trials have been removed from the Court of the Joint Magistrate. The orders directing a judicial inquiry by another Magistrate before the issue of processes, so as to postpone the trials, were therefore without any authority. In the next place it is very questionable

whether such an order could be passed, even if the cases had been removed by the District Magistrate to his own Court for trial. The law ordinarily provides that, after the examination of the complainant, on a complaint made to a Magistrate, process for the attendance of the accused shall issue and it is only when, in the terms of s. 202, the Magistrate after examining the complainant has reason to doubt the truth of the complaint, that he is authorized to suspend the issue of such process and to hold an enquiry or investigation into the truth of the complaint. The rules, therefore, must be made absolute, and the orders for judicial inquiry set aside, the complaints being placed before the Joint Magistrate, who will proceed in accordance with law.

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D.S. *Rules made absolute.*

27 C. 801.

[801] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

DHAN BIBI AND ANOTHER (*Defendants Nos. 1 and 5*) *v.* LALON BIBI (*Plaintiff*) AND PARBATI BAI AND OTHERS (*Defendants Nos. 2 to 4*).* [25th and 29th June, 1900.]

Mahomedan Law—Sunnis—Acknowledgment, effect of—Legitimacy of children—Fornication.

Under the Mahomedan law, where a child is begotten by a Mahomedan father by a Hindu prostitute living with him, no acknowledgment by the father can confer on the child the status of legitimacy.

[F., 34 B. 111 (114) = 11 Bom. L.R. 1117 = 4 Ind. Cas. 254 ; F., 32 C. 871 = 2 C.L.J. 97 = 9 C.W.N. 1003 ; Rel., 190 P.L.R. 1908 ; D., 9 C.W.N. 352 (362).]

ONE Khoda Baksh brought one Parbati Bai, a Hindu, from her mother's village and kept her in his house, where she lived as his concubine. The plaintiff, Lalon Bibi, is the issue of that connection. The present suit was instituted by the plaintiff to establish her right to and to obtain possession of a 12 annas share of the property left by her deceased father, the said Khoda Baksh. She alleged that her mother Parbati became a Mahomedan and was duly married by Khoda Baksh, and further that she was acknowledged by her father as his legitimate daughter.

The Judge before whom the case came on appeal held that Parbati never became a Mahomedan and consequently any marriage between her and Khoda Baksh would be invalid. With regard to the question of acknowledgment, the Judge found that "Khoda Baksh did formally acknowledge the plaintiff to be his daughter on the occasion of her marriage" and accordingly decreed the suit. On appeal, the High Court remanded the case to the Judge for retrial on the ground that the Judge should have found whether Khoda Baksh had acknowledged the plaintiff as his *legitimate* daughter.

[802] The District Judge, on remand, found that Khoda Baksh had acknowledged the plaintiff as his legitimate daughter, and accordingly allowed the appeal and gave the plaintiff a decree for her 12 annas share

* Appeal from Appellate Decree No. 2297 of 1898, against the decree of W.B. Brown, Esq., District Judge of Cuttack, dated the 2nd and 12th of September, 1898, reversing the decree of Babu Kali Kumar Bose, Subordinate Judge of that District, dated the 13th of March 1895.

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of the property, less the portion alienated to one of the defendants, against whom her claim was held barred by limitation.

Thereupon the defendants Nos. 1 and 5 again appealed to the High Court. The appeal came on for hearing on the 25th June, 1900.

The Advocate-General (Mr. *J. T. Woodroffe*), (Moulvi *Mahomed Yusuf* and Babu *Manmatha Nath Mitter* with him), for the appellants.—Upon the finding of fact arrived at by the lower Court, the question of acknowledgment does not arise. When the paternity of an illegitimate child is known, no acknowledgment can legitimatise the child. See Wilson's *Digest of Anglo-Muhammadan Law*, pp. 85-88, *Mahammad Allahadad Khan* v. *Mahammad Ismail Khan* (1), *Liaquat Ali* v. *Karimunnissa* (2) and *Aizunnissa Khatoon* v. *Karimunnissa Khatoon* (3). There is no reported case in which a contrary view has been taken. In the Privy Council case of *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim* (4), the present question was not decided.

Mr. *O'Kinealy* (Babu *Monmohan Dutt* with him), for the respondent.—The remand order disposes of the present contention, and the only question left open was whether there was any acknowledgment of legitimacy. As to the question of law, a marriage between Khoda Baksh and Parbati Bai was a *possible* one, as Parbati *might* have become a Mahomedan. See Amir Ali's *Students' Handbook of Mahomedan Law*, pp. 49, 55. The observations relied upon by the Advocate-General in *Mahammad Allahadad Khan* v. *Mahammad Ismail Khan* (1) and *Aizunnissa Kkatoon* v. *Karimunnissa Khatoon* (3) are *obiter* **[803]** *dicta*. It has been held that where there was no marriage between the parents, the offspring might be legitimated by acknowledgment: *Mahammad Azmat Ali Khan* v. *Lalli Begum* (5), *Sadakat Hossein* v. *Mahomed Yusuf* (6) and *Abdul Razak* v. *Aga Mahamed Jaffer Bindanim* (4). [RAMPINI, J.—In the last case it was found that there was no acknowledgment.] Else, why did their Lordships in the last cited case go into the question of acknowledgment? As it was found in that case that there was no marriage, their Lordships might have said, as has been contended in this case, that the question of acknowledgment did not arise. See *Nujmoodden Ahmed* v. *Beebee Zuhoorum* (7). [RAMPINI, J.—See Amir Ali's *Personal Law of the Mahomedans*, p. 218.] The effect of acknowledgment is to legitimatise a child between whose parents a marriage was possible. It may be said that the principle relied upon by the other side in *Mahammad Allahdad Khan* v. *Mahammad Ismail Khan* (1) has been impliedly overruled by the Privy Council in the case of *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim* (4).

Cur. adv. vult.

JUNE, 20. The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

JUDGMENT.

This is a suit brought by one Lalon Bibi to establish her right to obtain possession of a 12 annas share of the property of one Khoda Baksh, now deceased. The plaintiff alleges that her mother Parbati, who was a Hindu, became a Mussulman, and was married by Khoda Baksh, that she is the result of their union and was acknowledged by Khoda Baksh to be his legitimate daughter, and that she is accordingly entitled to the share of the property claimed by her.

(1) 10 A. 289. (2) 15 A. 396. (3) 23 C. 130. (4) 21 C. 666.
(5) 8 C. 422. (6) 10 C. 663=11 I. A. 31. (7) 10 W.R. 45.

The defence is that Parbati never became a Mahomedan, and was never married by Khoda Baksh, and that the plaintiff never was acknowledged by Khoda Baksh to be his daughter.

[804] The first District Judge, before whom the case came, found that Parbati was a Hindu prostitute, who lived with Khoda Baksh as his mistress; she never became a Mahomedan and Khoda Baksh never married her. He found, however, that Khoda Baksh had, before his death, acknowledged the plaintiff as his daughter.

When this case first came before this Court, *viz.*, on the 22nd March 1898, it was considered by it that it was necessary to remand the case to the District Judge to have a more explicit finding as to the nature of the acknowledgment made by Khoda Baksh with regard to the plaintiff and as to whether Khoda Baksh had acknowledged her to be his legitimate daughter. The District Judge, a different Judge from the first, has now found that the acknowledgment of Khoda Baksh with regard to the plaintiff went as far as this, and that he meant to and did acknowledge her as his legitimate daughter. He affirmed the other findings of his predecessor and gave the plaintiff the same decree as had been given her before the remand.

The defendants again appealed to this Court and on their behalf it has been urged before us that according to the Mahomedan law of the Sunnis, to which sect the parties belong, Khoda Baksh could not legally acknowledge the plaintiff to be his daughter and that no acknowledgment by him could confer on her the status of his legitimate offspring, because Parbati has been found never to have become a Mussulman and so Khoda Baksh could not and did not marry her. The plaintiff is, therefore, it is said, in the position of an illegitimate child, whose paternity is known, and hence she cannot be legitimatized. In support of this view the cases of *Mahammad Allahdad Khan* v. *Mahammad Ismail Khan* (1), *Liaquat Ali* v. *Karimunnissa* (2) and *Aizunnissa Khatoon* v. *Karimunnissa Khatoon* (3) have been cited.

On behalf of the respondent, on the other hand, the Privy Council cases of *Mahammad Azmat Ali Khan* v. *Lalli Begum* (4), *Sadakat Hossein* v. *Mahomed Yusuf* (5) and *Abdul Razak* v. *Aga* [805] *Mahomed Jaffer Bindanim* (6) have been relied on as showing that an illegitimate daughter in the position of the plaintiff can by the acknowledgment of her father be legitimated and placed in the position of an heir.

On behalf of the respondent it has also been contended that the question raised by the appellants does not properly arise in the appeal, as this Court by its order of remand in this case meant to lay down that, if the plaintiff were found by the District Judge to have been acknowledged by Khoda Baksh to be his legitimate daughter, that was conclusive of her right to succeed in this case.

We will first dispose of this latter plea. As one of the members of the present bench was a member of the bench that remanded this suit, it may be said with confidence that this Court, when it remanded the case, had no intention of deciding, nor did it decide, the important question of Mahomedan law now raised by the appellants. The object of the remand was rather to see, whether it was really necessary to enter into this question; for, if the plaintiff had not been found to have been acknowledged to be the legitimate daughter of Khoda Baksh, then on the other findings

(1) 10 A. 289. (2) 15 A. 396. (3) 23 C. 130.
(4) 8 C. 422. (5) 10 C. 663=11 I.A. 31. (6) 21 C. 666.

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of the District Judge, the whole suit would have failed. It is only when the District Judge has found that the plaintiff was so acknowledged by Khoda Baksh, that it becomes necessary to determine what the legal effect of that acknowledgment was. This Court when it passed the order of remand not unnaturally wished to have the full facts of the case clearly before it.

Turning to the cases cited on behalf of the appellants it must be admitted that the case of *Mahammad Allahadad Khan* (1), fully supports the contention that the plaintiff by Khoda Baksh's acknowledgment could not be legitimated. It is there laid down by Mahmud, J., that "there is no warrant in the principles of the Mahomedan law to justify the view that a child proved to be the offspring of fornication, adultery or incest could be made legitimate by any act of acknowledgment by the father. The rule is limited to cases of uncertainty of legitimate descent and proceeds entirely upon an assumption of legitimacy, and the establishment of such legitimacy by the force of such acknowledgment."

[806] Mr. Justice Straight in the same case says :—" Where there is no proof of legitimate birth or illegitimate birth and the paternity of a child is unknown in the sense that no specific person is shown to have been his father, then his acknowledgment by another, who claims him as his son, affords a conclusive presumption that the child acknowledged is the legitimate child of the acknowledger and places him in that category." From this, it would seem that Mr. Justice Straight was of the same opinion as Mr. Justice Mahmud, *viz.*, as expressed in another portion of the latter's judgment, that, "children born of *zina* (which means fornication, adultery or incest) can never be legitimated or entitled to inherit from their father, nor can such children be made legitimate by any kind of acknowledgment where the illegitimacy is proved and established.". It must, of course, be admitted that these observations of Straight and Mahmud, JJ., are *obiter dicta*, as the decision of this case proceeded on another point. But their views have been followed in two cases, *viz.*, in *Liaquat Ali* v. *Karimunnissa* (2) in which case the child was the result of adultery and was accordingly held not capable of being legitimated by acknowledgment, as his father could not have married his mother, the latter being at the time of the child's birth the wife of another man. The second case in which the views of Straight and Mahmud, JJ., above quoted, were followed, is the case of *Aizunnissa Khatoon* v. *Karimunnissa Khatoon* (3), which may be said to be the case of a child whose birth was the result of what would seem to be regarded in Mahomedan law as an incestuous union. It was the case of a Mahomedan marrying the sister of his wife. It was held that such a marriage was void and that the children of such marriage were illegitimate and could not inherit. The Judges who decided that case, Petheram, C.J. and Beverley, J., observed :— "The doctrine of acknowledgment is not applicable to a case in which the paternity of the child is known and it cannot be called in to legitimate a child which is illegitimate by reason of the unlawfulness of the marriage of its parents. This was distinctly laid down in the case of *Mahammad Allahdad* [807] *Khan* v. *Mahammad Ismail Khan* (1)." The learned Judges proceed to refer to Mr. Justice Ameer Ali's *Personal law of the Mahomedans*, at p. 218 of which the following passage occurs: "A child whose illegitimacy is proved beyond doubt by reason of the marriage of its parents being either disproved or found to be unlawful cannot be

(1) 10 A. 289. (2) 15 A. 396. (3) 23 C. 130.

legitimatised by an acknowledgment. Acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty." **1900 JUNE 29. — APPEL-LATE CIVIL. — 27 C. 801.**

Mr. Justice Ameer Ali in his *Students' Handbook of Mahomedan Law*, p. 54, has said "the person acknowledged must be of *unknown* birth. If the parentage is *known* to belong to somebody else, no ascription can take place to the acknowledger."

The present is an instance of the third of the cases referred to by Mr. Justice Mahmud, *viz.*, where the child is the result not of adultery or incest, but of fornication. It would seem to us that on the authorities cited above, we must hold that the acknowledgment by Khoda Baksh was of no avail and could not confer on the plaintiff the status of a legitimate child or of an heir. The paternity of the plaintiff is quite certain. It is admitted that Khoda Baksh was her father. Her mother is also known. She was Bai Parbati, a Hindu prostitute, whom Khoda Baksh did not marry and could not marry, for she was a Hindu at the time of Khoda Baksh's death.

The lower Courts rely on a passage at p. 277 of Mr. Justice Ameer Ali's Lectures as showing that the plaintiff might be legitimated by acknowledgment. The passage in question is to the effect that "when a Mahomedan marries a Hindu woman, the marriage is only invalid and does not effect the legitimacy of the offspring. I have already described the reasons which led to the prohibition of inter-marriages between Moslems and idolatrous females and also between non-Moslems and Moslemahs. In either case as already related though the marriage is invalid, the issues of the union are legitimate."

This passage has, however, in our opinion no application to the present case; for, in this case, there is now no question of [808] marriage. It has been found that Khoda Baksh never married plaintiff's mother.

There appears to us to be no direct authority against the above cited cases and views. The Privy Council cases quoted by the learned counsel for the respondents do not deal directly with the questions arising in the appeal. The case of *Mahammad Azmat Ali Khan* (1) appears to us to contain no passages directly in point. In the case of *Sadakat Hossein* (2), their Lordships of the Privy Council considered they were relieved by the view they took of the evidence "from offering any opinion upon the very important question of law which was raised by the counsel for the appellant, namely, whether, if there had been this marriage (*i. e.*, between the mother of the claimant and a third person, subsisting at the time of her connection with the acknowledger and of the conception of the claimant) the offspring of the adulterous intercourse could have been legitimated by any acknowledgment" Their Lordships therefore expressly declined to decide the point subsequently decided in *Liaquat Ali* v. *Karimunnissa* (3).

The third case is that of *Abdul Razak* v. *Aga Mahamed Jaffar Bindanim* (4). This case has some points of similarity with the present case. It was a case in which the question was of the legitimacy of a son born to a Mahomedan by a Burmese woman. In this case, as in the present, the Court below found that the Burmese woman had never been converted to the Mahomedan religion, and that no marriage of the parents had ever taken place. But it was further found that no acknowledgment

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(1) 8 C. 422. (2) 10 C. 663. (3) 15 A. 396. (4) 21 C. 666.

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of the son's being of legitimate birth had taken place and that a mere recognition of sonship was insufficient to effect the son's legitimation. On this ground the suit was dismissed. Now, in this case no question as to whether the father could have entered into a valid marriage with the mother, without her having relinquished Budhism, arose, or was decided. Hence, it appears **[809]** to us that that case affords no assistance to us in deciding the present one. But the learned counsel for the respondent contends that this question was impliedly decided, and that if their Lordships of the Privy Council had not thought that the son could in the circumstances have been legitimised by acknowledgment by the father, they would not have considered and decided whether he had acknowledged him.

We are, however, unable to concur in this view. Whatever may have been passing in their Lordships' minds, they have, in their judgment, said nothing which can be any guide to us in deciding the present case.

The learned counsel for the respondent further urges that, as there was no insurmountable obstacle to the marriage of the parents of the plaintiff, that is to say, as the plaintiff's mother, Parbati, might have been converted to Mahomedanism and as Khoda Baksh might then have married her, the plantiff's acknowledgment by Khoda Baksh could effect legitimation. But the learned counsel has cited no authority for this proposition, except the general rule laid down in the text books and in many cases of the Courts that children of unknown paternity can be legitimated by acknowledgment. But this does not seem to us to have any direct bearing on the question raised by the appellant in this appeal.

For these reasons we feel constrained to set aside the findings of the lower Court, and to hold that the plaintiff could not in the circumstances be legitimized by Khoda Baksh's acknowledgment. She is therefore not one of his heirs, and cannot succeed in this suit.

The appeal is accordingly decreed and the suit dismissed with costs.

M. N. R. *Appeal decreed.*

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27 C. 810=4 C.W.N. 692.

[810] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

SET UMEDMAL AND ANOTHER (*Petitioners*) *v.* SRINATH RAY AND ANOTHER (*Decree-holders*).* [21st March, 1900.]

Civil Procedure Code (Act XIV of 1882)*, ss.* 108, 244 *and* 314—*Sale in execution of an* ex-parte *decree and purchase by the decree-holder—Confirmation of the sale—Subsequent setting aside of the* ex-parte *decree—Application by a subsequent purchaser in execution of another decree, to set aside the sale on the ground that the* ex-parte *decree had been set aside.*

Certain immoveable properties were sold in execution of an *ex-parte* decree and were purchased by the decree-holder himself. After the confirmation of the sale, the decree was set aside under s. 108 of the Civil Procedure Code at the instance of some of the defendants in the original suit. On an application under s. 244

* Appeal from Order No. 221 of 1899, against the order of Babu Rajendra Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 17th of April 1899.

of the Civil Procedure Code having been made by a prior purchaser of the said properties in execution of another decree, to set aside the sale held in execution of the *ex-parte* decree the defence was that the application could not come under s. 244 of the Civil Procedure Code, and that the sale could not be set aside, as it had been confirmed. **1900 MARCH 21.**

Held, that the case was one under s. 244 of the Civil Procedure Code; and that the *ex-parte* decree having been set aside the sale could not stand, inasmuch as the decree-holder himself was the purchaser. **APPELLATE CIVIL.**

Doyamoyi Dasi v. *Sarat Chunder Mozoomdar* (1); *Beni Persad Koeri* v. *Lakhi Rai* (2); *Durga Charan Mandal* v. *Kali Prasanno Sarkar* (3); *Nawab Zainal-ub-din Khan* v. *Mahammed Asghar Ali* (4) and *Mina Kumari Bibee* v. *Jagat Sattani Bibee* (5) referred to. **27 C. 810 = 4 C.W.N. 692.**

[**F.**, 9 C.W.N. 134 (139); **Appl.**, 31 C. 499 (501); **R.**, 35 C. 61 = 6 C.L.J. 320 (330) (**F.B.**) = 11 C.W.N. 1011; 27 M. 93 (101); 5 C.L.J. 328 (332); 6 C.L.J. 102 (104); 11 C.L.J. 254 (259) = 13 C.W.N. 710 = 1 Ind. Cas. 871; 16 Ind. Cas. 945 (947); **D.**, 6 C.L.J. 92 (93).]

THIS appeal arose out of an application by the representative of the judgment-debtors to set aside a sale of certain immoveable properties. The facts are shortly these: An *ex-parte* decree was passed in favour of one Rajah Srinath Roy and others on the 13th February 1896, in a suit to enforce an equitable mortgage. Some of the mortgaged properties, which were sold in execution thereof, **[811]** were purchased by the decree-holders themselves on the 19th January 1897. The sale was confirmed on the 22nd February 1897. Subsequently to the sale two of the defendants, in the mortgage suit, who were minors, through their mother as guardian, applied to set aside the *ex-parte* decree, which was set aside by the High Court on appeal, on the 8th September 1898. On the 27th February 1899, the present petitioners applied to set aside the sale. Their case was that in execution of a money decree obtained by certain persons against the defendants in the mortgage suit, the said properties were purchased partly by one Chuni Lal and partly by one Sarup Kasturi for their benefit, on the 11th June 1896, and that therefore they were entitled to apply under s. 244 of the Civil Procedure Code to set aside the sale held in execution of the *ex-parte* decree, inasmuch as the said decree was set aside. The Court below rejected the application. Against this decision the petitioners appealed to the High Court.

Dr. *Ashutosh Mookerjee* (with him Babu *Sarat Chunder Ghose*), for the appellants.—In execution of an *ex-parte* decree certain immoveable properties were sold and were purchased by the decree-holders themselves. Later on the *ex-parte* decree was set aside. Now the question is whether the sale should be set aside. The present petitioners are the representatives of the judgment-debtors, and as such they are entitled to come under s. 244 of the Civil Procedure Code and to ask to set aside the sale: See the cases of *Beni Persad Koeri* v. *Lakhi Rai* (2) and *Durga Charan Mandal* v. *Kali Prasanno Sarkar* (3). When a decree-holder in execution of his decree purchases certain property, if the decree is subsequently set aside, the sale also fails to the ground. See the cases of *Nawab Zainul-ab-din Khan* v. *Mahommed Asghar Ali* (4) and *Mina Kumari Bibee* v. *Jagat Sattani Bibee* (5).

Dr. *Rash Behari Ghosh* (with him Babu *Bussunt Kumar Bose*), **[812]** for the respondents.—It has been said that the question which has been raised is a question under s. 244 of the Civil Procedure Code, but the appellants do not appear on the record, as the representatives of the judgment-debtors, and they cannot now be treated as the representatives.

(1) 25 C. 175. (2) 3 C.W.N. 6. (3) 26 C. 727.
(4) 15 I.A. 12 (15) = 10 A. 166. (5) 10 C. 220.

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4 C.W.N.
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Is the question, which the other side is seeking to raise now, a question in execution of the decree? I submit not. It is a question of restitution. I refer to s. 583 of the Civil Procedure Code to show that the Legislature has recognized the well-known distinction between *execution* and *restitution.* Although the *ex-parte* decree was set aside, the suit was set down for hearing, and the result of it was the affirmance of the old decree. The Full Bench case of *Ram Ghulam* v. *Dwarka Rai* (1) lends support to my argument that the question raised in this case is not a question "relating to the execution, discharge or satisfaction of the decree." The case of *Nawab Zainul-ab-din Khan* v. *Muhammad Asghar Ali* (2) is distinguishable. The decision in that case was passed upon a regular suit. This is really a proceeding for restitution and not one for setting aside a sale. The appellants are not entitled to question the sale simply because the *ex-parte* decree has been set aside, on the ground of non-service of summonses on the minor defendants, see *Gowree Boyjo* v. *Jodha Singh* (3).

Dr. *Ashutosh Mookerjee*, in reply.

The judgment of the High Court (MACLEAN, C. J. and BANERJEE, J.) was as follows:—

JUDGMENT.

MACLEAN, C.J.—This is an appeal by the representatives of the judgment-debtors against the decision of the Subordinate Judge of the 24-Purgannahs, dated the 17th of April 1899, refusing to set aside the sale of certain property which had been sold under a decree, and which was purchased by the respondents, who were themselves the decree-holders, but who had liberty to bid.

The facts may be shortly stated. The decree for sale was dated the 13th of February 1896, and was made in a suit to enforce an **[813]** equitable mortgage. The property in due course of execution was ultimately sold, and, as I have already said, the decree-holders became the auction-purchasers. The sale was confirmed on the 22nd of February 1897. On the 8th of September 1898, the decree was at the instance of some of the defendants set aside under s. 108 of the Code of Civil Procedure. On the 22nd of February 1899, the present application was made by the representatives of the judgment-debtor and the learned Subordinate Judge refused to set aside the sale. I may add, though in my opinion it does not affect the matter for present purposes, that on the 16th of December 1899, the same decree was again made in the presence of all the parties.

Upon this state of facts two questions have been argued, first that the case does not fall within the provisions of s. 244 of the Code of Civil Procedure, and that the present appellant ought to have instituted a separate and independent suit to set aside the sale, and, secondly, that as the sale has been confirmed, it cannot now be set aside. Upon the first question the tendency of the decisions in this Court, a tendency which has met with the approval of the Judicial Committee of the Privy Council, is to place a wide and liberal construction on s. 244 of the Code, and not to drive the parties to an independent suit, unless the case be clearly outside the scope and purview of the section. In support of this view I may refer to the cases of *Doyamoya Dasi* v. *Sarat Chunder Mozoomdar* (4), *Maharani Beni Prosad Koeri* v. *Lakhi Rai* (5), and to *Durga Charan Mandal* v. *Kali Prasanno Sarkar* (6). These cases appear to me to establish that the case falls within s. 244 of the Code, as I consider it does.

(1) 7 A. 170. (2) 15 I.A. 12=10 A. 166. (3) 19 W.R. 416.
(4) 25 C. 175. (5) 3 C.W.N. 6. (6) 26 C. 727.

As regards the second point, *viz.*, whether, notwithstanding the confirmation, the sale ought to be set aside, the fact that the decree-holder is himself the auction-purchaser is an element of considerable importance. The distinction between the case of the decree-holder and of a third party being the auction-purchaser is pointed out by their Lordships of the Judicial Committee in the [814] case of *Nawab Zainal-ab-din Khan* v. *Mahommed Asghar Ali* (1), and also in the case of *Mina Kumari Bibee* v. *Jagat Sattani Bibee* (2), which is a clear authority for the proposition that where the decree-holder is himself the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside. I am not aware that this decision, which was given in 1883, has since been impugned.

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I ought perhaps to refer to the case of *Gowree Boyjo* v. *Jodha Singh* (3), as some reliance was placed upon it by the learned vakil for the respondent. It is sufficient to say that the circumstances of that case were very different from those of the present, and that it cannot be regarded as an authority against setting the sale aside.

I have now dealt with the points which have been urged before us, and for the reasons I have stated, I consider the view taken by the Court below cannot be supported, and that the appeal must be allowed with costs.

BANERJEE, J.—I am of the same opinion.

S. C. G. *Appeal allowed.*

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27 C. 814 = 4 C.W.N. 818.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

SURENDRA KUMAR BASU (*Defendant*) *v.* KUNJA BEHARY SINGH (*Plaintiff*).* [17th July, 1900.]

Limitation—Presentation of a plaint, insufficiently stamped—Plaint not rejected, but the Court ordered to put in the deficit Court fee within a certain time—Effect of such an order—Court Fees Act (*VII of* 1870), *s.* 28—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 54—*Interest Act* (*XXXII of* 1839)—*Whether a Court is to allow interest from the date of the debt, where there is no contract to pay, and no demand made for payment of interest.*

[815] *Held*, that where a plaint was presented in the proper Court with insufficient stamp, and the Court, without rejecting it (the plaint), allowed a certain time to put in the deficit Court-fee which was done within the time allowed, for the purposes of limitation the suit should be considered to have been instituted on the date when the plaint was first presented.

Hari Mohun Chuckerbutty v. *Naimuddin Mahomed* (4) and *Moti Sahu* v. *Chhatri Das* (5) followed.

Yakutunnissa Bibee v. *Kishoree Mohun Roy* (6) and *Venkatramayya* v. *Krishnayya* (7) distinguished.

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* Appeal from Appellate Decree No. 2257 of 1898, against the decree of Babu Mohim Chundra Ghose, Subordinate Judge of Hooghly, dated the 17th of August 1898, modifying the decree of Babu Khetra Nath Dutta, Munsif of Howrah, dated the 6th of December 1897.

(1) 15 I. A. 12 (15) = 10 A. 166. (2) 10 C. 220. (3) 19 W. R. 416.
(4) 20 C. 41. (5) 19 C. 780. (6) 19 C. 747. (7) 20 M. 319.

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Held also, that on a suit for money lent without any written instrument, where it was found that there was no express contract to pay interest, but it was not found that any demand of payment was made in writing, and that there was any demand giving notice to the debtor that interest would be claimed from the date of the demand, in such a case the creditor was not entitled to any interest before suit.

[F., 31 C. 75 (78); 3 M.L.T. 63=123 P.R. 1907=82 P.W.R. 1907; 2 Ind. Cas. 1; Appr., 32 M. 305=6 M.L.T. 179=1 Ind. Cas. 507; D., 25 M.L.J. 531=14 M.L.T. 325=(1913) M.W.N. 836=21 Ind. Cas. 394; 21 Ind. Cas. 543=(1913); M.W.N. 874.]

THIS appeal arose out of a suit brought by the plaintiff to recover a certain sum of money as balance of principal with interest due from the defendant on account of money advanced to him from time to time. The allegation of the plaintiff was that the defendant had requested him (the plaintiff) to advance a certain sum of money with which the defendant would carry on a colliery business, stipulating that he would give the plaintiff within three or four months coal at a rate lower than the *bazar* rate, and take the price thereof, and that he would also give him a share in the business in lieu of interest; that according to the said contract the defendant took from him from 7th Assar 1299 B. S. up to 25th Assin various sums of money; that the defendant did not give him any coal, nor did the defendant specify the amount of his share; that notwithstanding repeated demands the defendant did not pay the amount due to him and hence the suit. The defence mainly was that the suit was not maintainable in the form it was brought; that it was barred by general and special law of limitation; and that the defendant was not liable for the amount claimed. It was found that the defendant gave an acknowledgment in writing of the debt on the 11th June [816] 1894. The plaint was presented on the 7th June 1897 in the Munsiff's Court, but it was insufficiently stamped. The plaint was not rejected, but the Court ordered the plaintiff to put in the deficit Court fee within fifteen days. The additional Court-fee was paid on the 15th June 1897. The Court of first instance holding that the plaintiff could not get a definite amount from the defendant, without a settlement of the accounts of the concern, dismissed the suit. On appeal the Subordinate Judge reversed the decision of the first Court, and allowed the plaintiff's claim with interest. As to interest the learned Subordinate Judge said as follows:—

"Then on the question of interest I have to say that there is no express contract to pay interest on the sum advanced, save and except, on a sum of Rs. 1,000 which has been already paid off. However, I would allow the plaintiff to recover interest, as he has been so long deprived of his use of the money at 6 per cent. per annum from the 1st January 1893, and I allow him a sum of Rs. 250 on this account."

Against this decision the defendant appealed to the High Court.

JULY 16, 17. Babu *Jogendra Chunder Ghose* (with him Dr. *Ashutosh Mookerjee*, Babu *Sanat Kumar Pal* and Babu *Atul Chunder Bose*), for the appellant:—

The suit was barred by limitation inasmuch as, although the plaint was presented on the 7th June 1897, within three years from the date of the acknowledgment, it was not sufficiently stamped and the deficit Court-fee was not paid until the 15th June 1897, and that was the date when the plaint should be considered to have been presented. See the cases of *Venkatramayya* v. *Krishnayya* (1), *Jinti Prasad* v. *Bachu Singh* (2). The

(1) 20 M. 319. (2) 15 A. 65 (66).

case of *Yakutunnissa Bibee* v. *Kishoree Mohun Roy* (1) is in my favour as there is no distinction between an appeal and a suit. They stand on the same footing. The observations of Mr. Justice Banerjee in the case of *Durga Charan Naskar* v. *Dookhiram Naskar* (2) go to support my contention. In the case of a suit s. 5 of the Limitation Act does not apply and time cannot be extended. In [317] the present case what was done by the Court was to grant time to put in the deficit Court-fee, and the order was purported to have been made under s. 54 of the Civil Procedure Code. There was no *bona fide* presentation of the plaint in the present case. The Court below was not justified in allowing interest, not only under the provisions of Act XXXII of 1839, but also upon the finding of the Court itself. Here there was no written instrument, no demand of payment, and no time fixed, and therefore the plaintiff was not entitled to any interest, prior to suit. See the case of *Abdul Kureem Khan* v. *Shaikh Méah Jan* (3).

1900, JULY 17. Babu *Shiba Prosunno Bhattacharyya*, for the respondent.—There was demand for interest in the case. The plaintiff is entitled to get interest at least on equitable principles. See the case of *Surja Narain Mukhopadya* v. *Pratab Narain Mukhoyadhya* (4).

JUDGMENTS.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) was as follows:—

MACLEAN, C. J.—Two points only have been raised upon this appeal. The question of whether or not the plaintiff and defendant were partners, has very properly not been pressed before us. The first point we have to determine is a question of limitation, and it arises in this way. There had undoubtedly been money transactions between the plaintiff and the defendant, and the former had undoubtedly lent the latter Rs. 1,000 for which he now sues, and on the 11th of June 1894 the defendant gave an acknowledgment in writing of the debt, which admittedly would take the case out of the Statute, if the suit were instituted within 3 years from that date.

The question then is, when was the suit instituted? The plaintiff says on the 7th June 1897, the defendant says on the 15th June 1897. If on the former date, the suit is not barred; if on the latter, it is. What then are the facts?

On its face, the plaint purports to have been filed on the 7th [318] June 1897 and this is what happened. The plaint was undoubtedly presented in the Court of the Munsif on the 7th of Juue 1897, but it was insufficiently stamped. The plaint was not rejected but the Munsif made, as I think he had power to do, under s. 28 of the Court Fees Act, this order: "The plaintiff to put in the deficit Court fee within 15 days." The further Court-fee was paid on the 15th June 1897. Which then is the date of the institution of the suit, the 15th or the 7th of June 1897? I am satisfied that the date must be taken to be the 7th June; not the 15th.

Various authorities have been cited to us upon the point, but there are two authorities, in this Court, which are distinctly in point, namely, the cases of *Huri Mohun Chuckerbutty* v. *Naimuddin Mahomed* (5) and *Moti Sahu* v. *Chhatri Das* (6). I agree with the reasoning and the conclusion of these cases, and I propose to follow them. They are consistent

(1) 19 C. 747. (2) 26 C. 925 (930). (3) 6 W.R. 288.
(4) 26 C. 955. (5) 20 C. 41. (6) 19 C. 780.

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with the purview of s. 28 of the Court Fees Act, with s. 54 of the Code, and I think I may add with common sense. The other cases in this Court do not deal with the precise question now under discussion, and I, therefore, do not think it necessary to deal with them in detail. I decide this point of limitation which apparently was not raised in the Court below against the appellant.

The second point is that the defendant ought not to have been charged with interest before suit and I think the appellant is right upon this point. It is clear that this case does not fall within Act XXXII of 1839, the debt does not fall within the description in the first alternative of the section, nor does it come within the second alternative, for there was no demand of payment made in writing, least of all was there any demand giving notice to the debtor that interest would be claimed from the date of the demand. The case, therefore, is not within the Act, nor has any argument been addressed to us based upon s. 73 of the Contract Act. It is difficult then, to see upon what ground interest has been allowed on the debt before suit, and it must be disallowed. The plaintiff, however, is clearly entitled to [819] interest from the date of the institution of the suit, and this has not been disputed. The decree, therefore, of the Court below must be varied by omitting therefrom any order for payment of interest before suit.

As the victory is a divided one, there will be no costs in this Court. Each party will pay his own. In the lower Court the costs will be proportionate.

BANERJEE, J.—I am of the same opinion. I only wish to add a few words with reference to the question of limitation. Of the cases in this Court bearing upon the point, the two that have been referred to in the judgment of the learned Chief Justice quite support the view in favour of the respondent, that s. 28 of Act VII of 1870 saves the case from being barred by limitation, as the second paragraph of that section provides, that upon a document insufficiently stamped having been received through mistake or inadvertence, if the deficiency in the stamp is supplied within a time to be fixed by the Court, the document and every proceeding relative thereto shall be as valid, as if it had been properly stamped in the first instance. There is only one case in this Court which was referred to in the argument of the learned vakil for the appellant, namely, the case of *Yakutunissa Bibee* v. *Kishoree Mohun Roy* (1) as lending support to his contention. But that case is distinguishable from the present. That was a case in which a memorandum of appeal had been presented on insufficient stamp; then the deficiency was ordered to be supplied within a certain time; it was not supplied within the time first allowed; then an extension of time was granted; and the deficiency was supplied before the expiry of the extended time. But at the hearing of the case the lower appellate Court held that the memorandum of appeal was presented out of time. Against that decision there was a second appeal preferred to this Court; and this Court held, having regard to the circumstances of that case, and no doubt also to the fact of the lower appellate Court having held that the appeal was presented out of time, that the case did not come within either the spirit or the letter of s. 28 of the [820] Court Fees Act. That case is no authority for saying that in this particular case in which the plaint was entertained in the first instance and the deficiency

(1) 19 C. 747.

in the Court fee was allowed to be supplied, and the case was tried on its merits, we must hold in second appeal that the Courts below were wrong in entertaining the suit, and that the lower appellate Court was wrong in holding that the suit was not barred by limitation. That case was decided with reference to its own facts, and is not really in conflict with the two other cases to which reference has been made by the learned Chief Justice. As for the case of *Venkatramayya* v. *Krishnayya* (1) that also is distinguishable from the present, because there the plaint was returned in order that it might be presented again upon a proper stamp and the learned Judges held that the case was one that could not come within the scope of s. 28 of the Court Fees Act.

1900 JULY 17. — APPELLATE CIVIL. — 27 C. 814 = 4 C.W.N. 818

Decree modified.

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27 C. 820.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

DURGA DAS RUKHIT AND ANOTHER (*Petitioners*) v. QUEEN-EMPRESS (*Opposite Party*).* [30th November, 1899 and 9th January, 1900.]

Sanction, application necessary for—Court—Collector under Land Acquisition Act, whether—Power of such Collector to administer oath or require verification—Deputy Collector under Land Acquisition Act—Judicial Officer—Revenue Court—Over-estimate of value of land—False Statement—False Evidence—Forgery—Revision—Rule, hearing of—Discretion of High Court to decide matters for which rule prayed for, but not granted—Criminal Procedure Code (Act V of 1898*), ss.* 190, 195, 439, 476 *and* 526—*Penal Code (Act XLV of* 1860), *ss.* 193, 196, 199, 467, 468 *and* 471—*Land Acquisition Act* (*I of* 1894), *Part VIII, s.* 53.

Sanction under s. 195 of the Code of Criminal Procedure should be given only on application made for it by some person, who may desire to complain [821] of the particular offence and whose complaint could not be entertained without such sanction. *In the matter of Banarsi Das* (2) and *Baperam Surma* v. *Gouri Nath Dutt* (3) referred to.

The expression "the Court" in the Land Acquisition Act does not include a Collector, nor is there any authority given to the Collector to administer an oath or to require a verification.

It is a false statement made under a verification that constitutes an offence under s. 193 of the Penal Code, not a verification oath or solemn affirmation.

The Deputy Collector acting under the Land Acquisition Act is not a Judicial Officer, he cannot properly be regarded as a Revenue Court within the terms of s. 476 of the Code of Criminal Procedure, his proceedings under the former Act are not regulated by the Code of Civil Procedure, nor is he right in requiring a petition put in before him to be verified in accordance with that Code so as to make any false statement punishable as perjury.

The Deputy Collector is not in a position to pass any final order in the matter of value of the land or the right to claim the price fixed, a party dissatisfied can claim a reference to the Civil Court whose duty it is to settle the matter in dispute judicially, therefore, to subject parties, who claimed the right to such a reference to a criminal prosecution, when the matters on which the Deputy Collector had formed an opinion as a Revenue Officer under the Land Acquisition Act must be submitted to the determination of a Court is obviously premature and improper, and is almost certain to operate very prejudicially towards them in the trial before the Civil Court of the same matter.

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* Criminal Revision No. 719 of 1899, made against the order passed by C. Faulder Esq., District Magistrate of Midnapur, dated the 11th of September 1899.

(1) 20 M. 319. (2) 18 A. 213. (3) 20 C. 474.

1900
JAN. 9.

CRIMINAL REVISION.

27 C. 820.

In proceedings under the Land Acquisition Act what may be found to be an exaggeration or over-estimate of the value of land cannot properly constitute a false statement, which would demand a prosecution for perjury and the fact that some years before the land was offered for sale at a much lower price is no sufficient ground for imputing such an offence.

Discretion of the High Court in revision at the hearing of a rule to consider, and decide matters in respect to which a rule had been prayed for, but not granted.

[**Diss.**, 8 Bom.L.R. 32 (34) = 3 Cr.L.J. 227 = 1 M.L.T. 47 ; **F.**, 30 C. 36 (87) ; **R.**, 32 C. 351 (355) = 9 C.W N. 277 ; 38 C. 230 (241) = 12 C.L.J. 505 = 15 C.W.N 87 = 8 Ind. Cas. 107 ; 38 C. 368 = 12 Cr.L.J. 411 = 11 Ind. Cas. 595 ; 13 Cr.L.J. 4 (5) = 13 Ind. Cas. 97; 8 O.C. 118 (120) ; **D.**, 3 Cr.L.J. 128 = 44 P.R. 1905, Cr. = 187 P.L.R. 1905.]

IN this case the petitioners put in claims to compensation to certain lands taken under the Land Acquisition Act before the Land Acquisition Deputy Collector of Midnapur. The Deputy Collector was very dilatory and unfavourably disposed in respect to these claims and he abstained from making any award or reference to the Civil Court, although pressed to do so by the petitioners. The petitioner moved the District Collector, who [822] was also the District Magistrate, by whom the records were sent for and the prosecution of the petitioners suggested. On the 9th of September 1899, the Deputy Collector passed orders under s. 195 of the Code of Criminal Procedure sanctioning the prosecution of the petitioners under ss. 193, 196, and 199 of the Penal Code for giving false evidence, in making statements before him an oath, knowing such statements to be false, and for intentionally fabricating false evidence by making documents containing false statements and using them as true, these offences having been committed in or relating to the proceedings taken by him under the Land Acquisition Act, and he at the same time reported the matter to the District Magistrate "for necessary action."

The District Magistrate issued warrants for the arrest of the petitioners and made over the cases to be tried separately to various Magistrates, and directed in respect to one of these cases that the Magistrate "should commit to the Court of Session, if he finds the evidence sufficient," and by another order he directed that bail should not be accepted "as the offences are not bailable."

The petitioners moved the High Court to quash these proceedings as void and contrary to law, and also asked in the alternative that the cases might be transferred to another District. A rule was granted only to consider the matter of transfer of the cases, but at the hearing of the rule upon the application for quashing the proceedings being renewed the Court decided to consider all the matters raised.

Mr. *Jackson* (with him Babu *Sarasi Churn Mitter*), for the petitioners.

JUDGMENT.

JANUARY 9. The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

PRINSEP, J.—The matter before us relates to proceedings before the Magistrate, which have arisen out of proceedings before a Deputy Collector under the Land Acquisition Act (I of 1894).

The two petitioners put in claims to compensation for certain [823] lands taken under that Act, and they have now been charged with offences which may shortly be described as forgery and perjury in making and attempting to substantiate those claims. The Deputy Collector was unusually dilatory in those proceedings, and apparently was unfavourably disposed in respect to those claims, and he abstained from making any

award or reference to the Civil Court, although he was pressed to do so by the petitioners. The petitioners then moved the District Collector who sent for the record, and it would seem that the orders for the prosecution of the petitioner, though subsequently passed by the Deputy Collector, were at the suggestion of the District Collector. The Deputy Collector, on 9th September, passed orders under s. 195 of the Code of Criminal Procedure giving sanction to the prosecution of the petitioners for certain offences set out in his order, those offences having been committed in or relating to the proceedings taken by him under the Land Acquisition Act, and he at the same time reported this to the District Magistrate "for necessary action." The District Magistrate then took cognizance of these offences. He issued warrants for the arrest of the petitioners for certain specified offences; he made over the cases to be tried separately to various Magistrates subordinate to him; he directed in respect to one of these cases that the Magistrate "should commit to the Court of Session, if he finds the evidence sufficient," and by another order of the same date he directed that bail should not be accepted "as the offences are not bailable." The petitioners then moved this Court to quash these proceedings as void and contrary to law, and they also asked in the alternative that the cases might be transferred to another District away from the influence of this District Magistrate.

A rule was granted only to consider the matter of transfer of the cases.

Mr. Jackson, who appeared for the petitioners in placing the facts of this matter before us, has renewed this application for quashing the proceedings. We propose to consider all the matters raised, and we find no difficulty in doing so, as although there is no appearance against the rule, the District Magistrate in an explanation submitted deals *seriatim* with all the objections raised in the petition on which the rule was granted.

[824] Now as regards the rule for a transfer of the trial of these cases to another District, we may at once say that we think that no sufficient grounds are shown for supposing that the Magistrates in whose Courts they are, will not try them fairly on their merits. The District Magistrate, both in that capacity and also as District Collector, has no doubt taken a prominent part in these proceedings. As we have already stated, as District Collector he has, we think, had some share in instigating the order passed by the Deputy Collector sanctioning the prosecution of the petitioners. After that sanction had been given under s. 195 of the Code of Criminal Procedure the copy of the order was sent to the same officer, who held both the offices of District Collector and District Magistrate "for necessary action." Now this was a very unusual proceeding, and it was also very irregular. Sanction under s. 195 of the Code of Criminal Procedure should be given only on application made for it by some person who may desire to complain of the particular offence, and whose complaint could not be entertained without such sanction. We need only refer to *In the matter of Banarsi Dass* (1) and *Baperam Surma* v. *Gouri Nath Dutt* (2) amongst several authorities for this, if any authority be necessary for such an obvious practice. We cannot find that any application for sanction was made. Indeed, the order of the Deputy Collector of 9th September and his subsequent order of 18th *idem* indicates that he acted *proprio motu*.

(1) 18 A. 213. (2) 20 C. 474.

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The latter order passed after his report of the 9th September to the District Magistrate "for necessary action" shows that he had a doubt whether that order was a proper order under s. 195, Code of Criminal Procedure, and it also shows his desire by referring to s. 476 to legalise "any necessary action" that the Magistrate might take. But action had already been taken by the District Magistrate, and this could not be affected by any subsequent order of the Deputy Collector. It will be necessary again to refer to this matter. It is sufficient at present to repeat that sanction under s. 195 was given *proprio motu* by the Deputy Collector, and without application for it by any person desiring to make a complaint regarding these offences. [825] As to what followed we do not mean to say that the District Magistrate was not competent under s. 190 (1) (*c*) to take cognizance of the offence, but as the matter was then before him he was competent to do so only on sanction properly given, and there was no proper sanction. Consequently he was not in a proper position to act. That, however, would affect the validity of the proceedings, which will be hereafter considered. But taking it that he was competent to institute the prosecution and to make over the cases for inquiry or trial to certain subordinate Magistrates, is there sufficient ground for holding that the proceedings before such Magistrates will not be fairly and properly conducted, that they are so far dominated by the opinion recorded by the District Magistrate, and the part he has already taken in this matter, as to lead us to believe that these Magistrates will not exercise a fair and independent judgment in dealing with the evidence given before them? The District Magistrate has, no doubt, improperly dictated to one of these Magistrates that he should "commit one case to the Court of Session, if he finds that the evidence is sufficient," and he has refused to admit the petitioners to bail. In both instances the order was erroneous. In the first case, as one of the charges was triable by a Magistrate, as well as the Court of Session, commitment would not necessarily follow, if a *prima facie* case had been established. In the other case the offences were all bailable, but in this respect on application made to him the Sessions Judge has under s. 498 of the Code of Criminal Procedure admitted both of the petitioners to bail. At any rate we are not prepared to say that with this expression of opinion these Magistrates would so far fail in their duty as Judicial Officers as to be biased in their judgment so as to show incapacity to fill their offices. We may add that there is nothing on the record to show that they have in any way acted in these cases. We, therefore, see no sufficient ground to transfer these cases to another District.

And now to consider the matter on its merits.

Sanction under s. 195 of the Code of Criminal Procedure, we have already stated, was improperly granted by the Deputy Collector *proprio motu*. In the next place the matter could not be dealt with under s. 476. A Deputy Collector acting [826] under the Land Acquisition Act is not a Judicial Officer. He cannot be properly regarded as a Revenue Court within the terms of s. 476. The District Magistrate is wrong in maintaining that the proceedings of the Deputy Collector under the Land Acquisition Act are regulated by the Code of Civil Procedure, or that the Deputy Collector was right in requiring the petition put in by the petitioners now before us to be verified in accordance with that Code, so as to make any false statement punishable as perjury. Section 53 of the said Land Acquisition Act sufficiently indicates this. It declares that the provisions of the Code of Civil Procedure shall apply to all proceedings before the

Court under that Act. But the context clearly shows that by this expression "the Court," a Collector is not included. The whole of Part VIII of the Act in which s. 53 appears distinguishes between orders and proceedings by or before a Collector and those by or before a Judge or Court. There is no authority that we can find given to a Collector to administer an oath or to require a verification. The nature of his duties also shows this. He can pass no final order of any sort save with the consent of the parties. We observe that amongst the matters charged is the making of a false verification. It is a false statement made under a verification that constitutes an offence punishable under s. 193, not a verification on oath or by solemn affirmation. We may also point out here that what may be found to be an exaggeration or over-estimate of the value of land cannot properly constitute a false statement denounced as an attempt to cheat, which would demand a prosecution for perjury, and the fact that some years before the land was offered for sale at a much lower price is no sufficient ground for imputing such an offence. The Deputy Collector, not being a Judicial Officer, when acting under the Land Acquisition Act, could not as a Judicial Officer take cognizance of any of the offences mentioned in his order.

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There is also another objection to the present proceedings. The Deputy Collector is not in a position to pass any final order in the matter of value of the land or the right to claim the price fixed. A party dissatisfied can claim a reference to the Civil Court, whose duty it is to settle the matter in dispute judicially. The petitioners claimed the right to such a reference **[827]** and to subject them to a criminal prosecution when the matters on which the Deputy Collector had formed an opinion as a Revenue Officer under the Land Acquisition Act must be submitted for the determination of a Court was obviously premature and improper. Such a proceeding was almost certain to operate very prejudicially towards them in the trial before the Civil Court of the same matters.

If the District Magistrate had acted under s. 190 (*c*) of the Code of Criminal Procedure—and that is not the case before us—it would have been for us to consider whether, having regard to the fact that the Civil Court will be called upon to adjudicate on these mattters, his action was sustainable.

For all these reasons we are of opinion that the trials ordered by the District Magistrate do not proceed on proper grounds in point of law, and also that there are at present no sufficient grounds for such trials. We accordingly declare the order of the Deputy Collector of the 9th and 18th September to be null and void, and we set aside the order of the District Magistrate, dated 9th September, which is based on those orders.

1900
MAY 25.

FULL BENCH.

27 C. 827 (F.B.)= 4 C.W.N. 357.

27 C. 827 (F.B.)=4 C.W.N. 357.

FULL BENCH.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice, Mr. Justice Macpherson, Mr. Justice Banerjee, Mr. Justice Hill and Mr. Justice Stevens.

SRISH CHUNDER BOSE (*Plaintiff*) *v.* NACHIM KAZI AND OTHERS (*Defendants*).* [9th March and 25th May, 1900.]

Provincial Small Cause Court's Act (*IX of* 1877), *sch. II, cl.* (8)—*Suit by an assignee of arrears of rent after they fall due, whether cognizable by the Small Cause Court—Bengal Tenancy Act* (*VIII of* 1885), *s.* 3, *sub-s.* 5—*Rent.*

Held by the Full Bench, (BANERJEE, J., dissenting) that a suit brought by an assignee of arrears of rent after they fell due, for the recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes.

[F., 4 C.W.N. 605; R., 16 C.L.J. 360 (365); D., 4 C.L.J. 402.]

[828] THIS case was referred to a Full Bench by MACLEAN, C. J., and BANERJEE, J., on the 5th September 1899 with the following opinion:—

ORDER OF REFERENCE TO FULL BENCH.

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff-appellant, to recover a sum of Rs. 362-6 annas 9 pie on the allegation that the said amount was due from defendants Nos. 1 to 7 as rent, cesses and interest for the period from 1299 to the Pous or ¾th *kist* (instalment) of 1302, on account of a *jama* of Rs. 75-12 annas held by them under the defendants Nos. 8 to 25 who are called in the plaint *pro forma defendants*, and that the plaintiff was entitled to recover that sum as he had on the 17th of Magh 1302 purchased from the *pro forma defendants* their right to recover the same, and had given notice of his purchase to the tenant-defendants.

The tenant-defendants in their defence raised various objections of which it is necessary for the purposes of this appeal to refer to only one, namely, that the suit was not cognizable by the Munsif's Court. The first Court overruled this objection, and finding for the plaintiff on the other questions raised, it gave him a decree. On appeal by the tenant-defendants the lower appellate Court has reversed that decree, holding that the suit was cognizable by the Court of Small Causes and not by that of the Munsif, and it has directed the plaint to be returned to the plaintiff for presentation to the proper Court.

Against that decision the plaintiff has preferred the present appeal. It is contended on his behalf that the suit is one for rent, and as such is excepted from the cognizance of the Small Cause Court and is triable by the Civil Court, and in support of this contention the cases of *Shama Sundari Dassi and others* v. *Brindaban Chunder Mazumdar* (1), *Kishen Koommar Mitter and others* v. *Mohesh Chunder Bannerjee* (2), *Hurri Nath Muzoomdar and others* v. *Messrs. Moran & Co.* (3), *Reedoy Monee Burmonee* v. [829] *Hugh Sibbold* (4), and an unreported decision of this Court in appeal from appellate Decree No. 1193 of 1898 are relied upon.

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* Full Bench Reference in Appeal from Appellate Decree No. 1836 of 1897.

(1) (1862) Marshall's Rep. 199.
(2) W. R. 1864, Act X, Rul. 3.
(3) W. R. 1864, Act X, Rul. 127.
(4) 15 W. R. 344.

On the other hand, it is argued for the defendants, respondents, that the plaintiff having purchased merely the landlord's rights to recover a certain amount of rent after the whole of it had accrued due, could not claim the same as rent due to him; that certain provisions of the Bengal Tenancy Act, namely, s. 3, sub-s. (5) and s. 148, cl. (*h*), go to show that a mere assignee of the landlord's right to arrears of rent is not entitled to have his suit for the arrears assigned to him treated as a suit for rent; that the cases cited are distinguishable from the present; and that the case of *Lalla Bhugwan Sahoy* v. *Sungessur Chowdhry* (2) supports the view taken by the lower appellate Court.

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I am of opinion that the appellants' contention is not correct. It is true that what is claimed by the plaintiff under the assignment in his favour was originally due as rent from the tenant-defendants to the plaintiff's vendors. But is it due to the plaintiff as rent? The answer to this question must be in the negative, for this simple reason that rent [see the definition of the term in s. 3, sub-s. (5) of the Bengal Tenancy Act] can only be due from the tenant to his landlord, and the plaintiff has not in any sense acquired the position of landlord to the defendants. The case might have been different, if the plaintiff had been the assignee of rent accruing due after the assignment, as in that case the assignment might be regarded as in effect a lease, but that is not the case here. The only right in which the plaintiff can make the present claim is as assignee of a debt, which was due to the assignor as rent.

It might be said that the money now claimed was due from the principal defendants as rent, and so far as they are concerned, its character could not be changed by any dealing with it to which they were no party. But the question whether a suit for money should be treated as one for rent or not depends not upon the ground on which the defendants' liability originally arose, but upon the ground on which the plaintiff's **[830]** right to the relief claimed rests. The former might have arisen from the relation of landlord and tenant, but the latter arises merely from assignment of a debt without any assignment of the landlord's interest in the land.

There is another way in which the matter may be viewed. If the right of the plaintiff and the liability of the defendants were still a right to and a liability for rent, the former could be satisfied, and the latter discharged only on payment of the whole rent that was due. But having regard to the provisions of s. 135 of the Transfer of Property Act and the price stated in the plaintiff's *kobala*, the defendants were entitled to a discharge on payment of a much smaller amount. This shows, that the nature of the original liability is materially altered by the assignment.

The provision in cl. (*h*) of s. 148 of the Bengal Tenancy Act also goes to show that it is not the policy of our law to treat a claim by an assignee of rent as one for rent. For if a landlord after obtaining a decree for arrears of rent cannot assign the decree so as to empower his assignee to execute it as a decree for rent, it would be anomalous to hold that an assignee of arrears of rent before any suit is brought can claim the same as rent.

It may be argued that, if a suit like the present is not to be treated as one for rent, the result will be that the landlord may, by assigning over his claim for arrears of rent to a third party, deprive the tenant of his right of appeal from any decree that may be passed against him, and may

(1) 19 W.R. 431.

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also deprive him of his right to deposit rent under s. 61 of the Bengal Tenancy Act. The answer to such an argument is shortly this : As regards the right of appeal from an adverse decree, if the tenant loses that, he gains two compensating advantages ; for in the first place, the period of limitation for a suit by an assignee of arrears of rent, if such a suit is treated as one not for rent, is shorter than that for a suit for arrears of rent, time running not from the end of the year in which an instalment falls due but from the date of its falling due ; and in the second place, by s. 135 of the Transfer of Property Act, the tenant becomes entitled to release from liability on payment of the price paid by the assignee and incidental costs, which must generally be less than the [831] amount of the arrears due. Moreover the reason for allowing an appeal in certain cases in rent suits not exceeding one hundred rupees in value, as indicated by s. 153 of the Bengal Tenancy Act does not apply to a suit by an assignee of the arrears of rent. No adverse decree in such a case even when it decides a question of the amount of rent payable, being admissible in evidence in a subsequent suit for rent by the landlord. And as regards the right of depositing rent, no tenant would be likely to claim it as against an assignee of the arrears due, when by s. 135 of the Transfer of Property Act, he can generally obtain his discharge on payment of a lesser amount than what he has to deposit under s. 61 of the Bengal Tenancy Act.

The view I take that a suit like the present should be regarded as one for an ordinary debt and not as one for rent, is supported by the case of *Lalla Bhugwan Sahoy* v. *Sungessur Chowdhry* (1), in which Couch, C.J. observes :

" In this case there appears (*sic*) to be two causes of action. One for two years' rent by the plaintiff as the purchaser of the arrears of rent due in respect of those years, the purchaser in fact of a debt for which he must sue in the Civil Court, and it is not a suit for rent due to the plaintiff."

It remains now to consider the cases cited for the appellant. They are more or less distinguishable from the present. The first case, *Sama Sundary Dasi* v. *Brindaban Chunder Mozumdar* (2), was decided with reference to Act X of 1859, and Sir Barnes Peacock in his judgment observes : " There is nothing in the Act to show that it was not intended to apply to such a case as the one now before us." The rent law now in force in the district in which this case arose is not Act X of 1859 but the Bengal Tenancy Act ; and I have shown above that there are provisions in the last-mentioned Act which show that it is not intended to apply to a case like this. The same remark applies to the other three reported cases cited, which in effect follow the first-mentioned case. As for the unreported case, that also was not decided with reference to the Bengal Tenancy Act, [832] as the case came from Sylhet to which that Act did not apply. But as there are certain general observations in these cases which might be construed to apply to the present, and as, with all respect for the learned Judges who decided those cases, I am, for the reasons given above, unable to concur in those observations, I think the following question must be referred to a Full Bench for determination, namely,

Whether a suit brought by an assignee of arrears of rent after they fell due, for recovery of the amount due, is a suit for rent and therefore excepted from the cognizance of the Court of Small Causes, or whether

(1) 19 W. R. 431. (2) (1862) Marsh Rep. 199.

it should be treated as an ordinary suit for money and therefore not so excepted. 1900 MAY 25.

And as the question arises in an appeal from an appellate decree, the whole case must according to the rules regulating Full Bench References, be referred for decision to a Full Bench. — FULL BENCH.

MACLEAN, C. J.—I concur in thinking that this case should be referred to a Full Bench, reserving my opinion upon the question in controversy. — 27 C. 827 (F.B.) = 4 C.W.N. 357.

1900, MARCH 9. Babu *Surendra Chunder Sen*, for the appellant.—The question in this case is whether the suit is one cognizable by the Court of Small Causes. It is a suit for recovery of a sum of money by an assignee of arrears, of rent after they fell due; in other words it is a suit for recovery of a sum of money which was payable by the tenant to his landlord, therefore it is a suit for rent. By the assignment the nature of the suit is not changed, the assignee stands in the shoes of the landlord. The question which is to be considered in this case is whether the amount claimed is or is not rent within the meaning of the Provincial Small Cause Courts Act. I submit it is rent, therefore excepted from the cognizance of the Provincial Small Cause Courts Act. Clause (8), sch. II of the Small Cause Courts Act is silent as to who is to bring the suit, therefore, it is to be understood that the suits contemplated by that article are suits irrespective of the question as to whether they are brought by a landlord or not. But there is a limitation in cl. 13. The word rent should be taken in its ordinary sense, and the cases under the old Act will apply to the present case. See *Shama* [833] *Sundari Dassi* v. *Brindaban Chunder Mazumdar* (1), *Kishen Koomar Mitter* v. *Mohesh Chunder Bannerjee* (2), *Hurri Nath Mozoomdar* v. *Moran & Co.* (3), *Reedoy Monee Burmonee* v. *Hugh Sibbold* (4) and the case of *Sheik Munsar* v. *Lokenath Roy* (5) is in all fours with the present case. If by assignment of rent its character is changed, and if it becomes a suit of the nature cognizable by the Small Cause Court, the tenant by an act of the landlord loses the right of appeal, and also he is prevented from depositing the rent under s. 61 of the Bengal Tenancy Act. Such a result would be anomalous.

Moulvi *Syed Samsul Huda*, for the respondent.—The present case is governed by the Bengal Tenancy Act. Rent is defined in the Act, as what is payable by the tenant to the landlord for the use and occupation of the land. In this case the assignee is not a landlord, and no sooner the rent is transferred to a third person, its character is changed, and it becomes an ordinary debt. The defendant is not the tenant of the assignee. There was no definition of the term rent in the old rent law and therefore the cases cited by the other side are not applicable to the present case. The case of *Lalla Bhugwan Sahoy* v. *Sungessur Chowdhry* (6) supports my contention.

Babu *Surendra Chunder Sen* in reply.

Cur. adv. vult.

JUDGMENT.

1900, MAY 25. MACLEAN, C. J.—The question submitted is, "whether a suit brought by an assignee of arrears of rent after they fell due, for recovery of the amount due is a suit for rent, and therefore excepted

(1) (1862) Marsh Rep. 199.
(2) W. R. 1864, Act X, Rul. 3.
(3) W.R. 1864, Act X, Rul. 127.
(4) 15 W. R. 344.
(5) 4 C.W.N. 10.
(6) 19 W.R. 431.

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from the cognizance of the Court of Small Causes, or whether it should be treated an an ordinary suit for money, and therefore not so excepted."

The question is a short one, and, but for the view entertained by my learned colleague Mr. Justice Banerjee, I should have thought not a very intricate one.

[834] The question after all is only as to the Court in which the suit is to be brought, and in the interest of litigants it is desirable that, as regards this Province at any rate, the matter should, as far as possible, be definitely settled. It is clear that the assignor could not have sued for these arrears of rent, in the Small Cause Court, and I fail to understand, upon what principle the assignee, who stands in the assignor's shoes, should be entitled, or bound to do so. The debt, in its inception, was clearly in respect of that which is known as "rent," and if the assignor had sued for it, he must have sued in the Civil Court, and if the assignee had sued in the name of the assignor, assuming that by the contract between them he was entitled so to do, the suit must have been brought in the Civil Court. If this be so and it must be so, when and how is the Small Cause Court substituted for the Civil Court? It is said that this is not rent because the assignee is not the landlord of the tenant, and rent, under the definition in the Bengal Tenancy Act (s. 3, sub-s. 5) is only that which is lawfully payable by a tenant to his landlord for the use or occupation of the land held by the tenant. But as between the assignor and the tenant, the money due was clearly for rent, and as the assignee in respect of this debt, which was rent, stands in the shoes of the landlord, is it unreasonable to say that what he is seeking to recover is the rent which was due to his assignor, and if so, why is it not a suit for the recovery of rent, and so excepted from the jurisdiction of the Small Cause Court? I think there is much force in the reasoning of the learned Judges in the unreported cases—special appeal No. 1193 (and analogous cases) of 1898, where those learned Judges say, "what was assigned in this case was the right to receive from the tenant the rent then due to the assignor, and it seems to us that the suit brought by the assignee against the tenant is a suit to recover the rent within the meaning of art. 8. The money was due as rent at the time of assignment, and the assignment did not deprive it of that character, so far at all events as the tenant was concerned. If it were not so, and rent which had become due ceased, when assigned, to be rent it would follow that an assignment, to which the tenant was not a party, would have the effect of changing the tribunal to which the contracting parties [835] subjected themselves at the time of the contract with reference to the subject-matter of it, and depriving the tenant of rights to which he was entitled; for example, the right of an appeal, the right of making a deposit, and possibly other rights. It would not, we consider, be right to construe art. 8, as limited to suits brought by the landlord and so as to exclude suits brought by a person who represented the landlord, whether the representation was by an assignment or otherwise."

The bulk of the authorities cited in the reference appear to me to support this view, which on principle seems to me to be sound, nor do I think that the case of *Lalla Bhugwan Sahoy* v. *Sungessur Chowdhry* (1) is an authority against it, for, if carefully examined, the passage from the judgment in that case, cited in the reference, appears to be scarcely consistent with a later passage in the same judgment. Besides the precise

(1) 19 W.R. 431.

point, now before us, was not then before the Court in that case. It may be that the view I take may lead to certain anomalies; but take which view we may, some anomalies must result, so that any argument to be deduced from possible anomalies may perhaps with prudence be eliminated from the discussion.

In my opinion this suit is one for the recovery of rent, and excepted from the cognizance of the Small Cause Court. The appeal must be allowed, and the case remitted to the lower Court for decision on the merits. The respondent must pay the costs before the referring Court, and of this reference.

MACPHERSON, J.—I agree. I see no reason to change the opinion which I formed in the unreported case, special appeal No. 1193 of 1898, and other analogous cases, and I have nothing to add to what I said in that case and to what has been said by the learned Chief Justice in the present case, beyond this that a suit may be a suit for rent and yet not a suit to which all the provisions of the Tenancy Act would apply. A suit by a co-sharer for his share of the rent is a suit for rent, but it is not a suit of the kind contemplated or provided for by the Tenancy Act.

HILL, J.—I agree in what has been said by the learned Chief Justice.

[836] STEVENS, J.—I agree with the learned Chief Justice.

BANERJEE, J.—I regret very much that I am unable to agree with my learned colleagues in this case.

The question for the determination of which the case has been referred to a Full Bench is,—

"Whether a suit brought by an assignee of arrears of rent after they fell due, for recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes, or whether it should be treated as an ordinary suit for money and therefore not so excepted."

The answer to this question must depend primarily upon the provisions of the Small Cause Courts Act (IX of 1887).

By cl. 8 of the second schedule of that Act—"A suit for the recovery of the rent," is, subject to certain qualifications not necessary to be considered here, excepted from the cognizance of a Court of Small Causes, and the question then is whether a suit by an assignee of arrears of rent brought for recovery of the amount due is "a suit for recovery of rent" within the meaning of that clause, the assignment having been made after the arrears of rent fell due, and not including any part of the landlord's interest in the land in respect of which the rent was due. The Act does not define rent, but according to the ordinary signification of the term, it means (I confine my remarks to money rent) money payable by one person for use and occupation of land to another person under whom he holds the land. That the qualifying words "under whom he holds the land" or some other words to the same effect, must form a necessary part of the definition, will be evident from the consideration that money may be payable by one person to another for the occupation of land, as for instance a municipal rate on a holding, which is not rent. An arrear of rent is a debt, but there are two characteristics which distinguish it from other kinds of debts, (1) it is due for the use and occupation of land, and (2), it is due to the person under whom the land is held. This is not disputed; but it is argued for the appellant that as the debt in question had both these characteristics when it fell due, and is claimed by an assignee of the landlord, it continues [837] to be an arrear of rent notwithstanding the transfer by the landlord to the plaintiff of the right to recover it; and a

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suit by the transferee for the amount due must be regarded as a suit for the recovery of rent. This argument no doubt requires consideration. But after considering it carefully, I am unable to accept it as correct. The argument is based on the assumption that the transferee claims the amount in the same right as the landlord, an assumption which is not wholly correct. If the landlord had transferred to the plaintiff not only his right to the arrears of rent, but also his interest in the land, it was then only that the transferee could be said to be claiming the amount in the same right as the landlord. But as the landlord's interest in the land has not been transferred to the assignee of the arrears of rent, the claim for the amount ceased to be one for rent after the assignment, by reason of the second characteristic, namely, that of the debt being due to the landlord no longer attaching to it, and it became reduced to a claim for an ordinary debt.

There is another way in which this matter may be viewed. A person can claim rent only from his tenant. The defendant is not a tenant of the plaintiff. The present suit cannot therefore be considered as a suit for rent. As I have said in the referring order, the question whether a suit for money should be treated as one for rent or not, is to be answered, not with reference to the ground upon which the defendants' liability originally arose, but with reference to the ground on which the plaintiff's right to the relief claimed rests.

The letter of the law (cl. 8 of the second schedule of Act IX of 1887), therefore is, in my opinion, in favour of the respondents' view and against that of the appellant.

Let us next see which view the spirit, that is the reason, of the law favours. As far as one can gather from the provisions of the Provincial Small Cause Courts Act, and especially from the second schedule to it, the reason why certain suits though of small value are excepted from the jurisdiction of the Court of Small Causes, is, that either on account of their involving complicated questions for determination, or on account of their involving important consequences to the parties, or on account **[838]** of both, it is undesirable that they should be tried by a Court of summary jurisdiction. Among the excepted suits, a suit for rent often involves complicated questions such as those of title to land, and always involves important consequences to the parties such as *prima facie* fixing the rate of rent for future years (see s. 51 of the Bengal Tenancy Act), and creating liability to ejectment, if the tenant is a non-occupancy ryot (see s. 66 of the same Act). But the same thing does not hold good when an assignee of arrears of rent brings a suit for the amount assigned over. Such a suit may involve questions of title, but it can never in its result carry with it any of the important consequences to the parties, that a suit for rent by a landlord does. A decree in such a suit is no evidence against the landlord suing for arrears of rent for subsequent years; nor can any decree for ejectment of the tenant be made on the basis of a decree made in such a suit.

It was argued that, if a suit like the present be held to be cognizable by a Court of Small Causes, the defendant will be deprived of his right of appeal by an act of his landlord, to which he was no party. That no doubt is an apparent anomaly. But an explanation of the anomaly is furnished by the fact that one cogent reason for allowing an appeal in a rent suit, namely, that founded on the importance of its result to the parties, is, as I have shown above, wanting in the case of a suit by an assignee of arrears of rent. But while the anomaly arising

from the view I take is capable of explanation, a greater and a more inexplicable anomaly would result from the opposite view. For if a suit by an assignee of arrears of rent for the amount due be held to be excepted from the cognizance of a Small Cause Court, an appeal and also a second appeal will always lie in such a suit, whereas if the suit had been brought by the landlord, an appeal would lie in such a suit only to the extent allowed by s. 153 of the Bengal Tenancy Act. Thus in a suit for any amount, however small, brought by an assignee of arrears of rent, an appeal and a second appeal will always lie even where the suit involves no question of rate of rent or title to land, though, if the landlord had brought the suit, not even one appeal could lie.

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As regards the argument that, upon the view I take, assignment **[839]** of arrears of rent by the landlord will deprive the tenant of his right to deposit rent under s. 61 of the Bengal Tenancy Act. I may observe in addition to what I have said in the referring order, that it is by no means clear that the tenant will be deprived of this right in cases coming under cl. (*d*) of sub-s. (1) of s. 61.

Weighing the considerations for and against the two views, I think those in favour of the respondent's view preponderate.

With regard to the cases cited, I will only add to what I have said in the referring order, that, on a question like the one before us, the determination of which does not affect any vested rights of parties, there is not the same reason for not departing from a current of decisions shown to be erroneous that there is where such departure may be likely to unsettle titles.

For all these reasons I would say in answer to the question stated in the reference that a suit like the present is not excepted from the cognizance of a Court of Small Causes, and I would dismiss this appeal.

S. C. G. *Appeal allowed ; case remanded.*

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27 C. 839 (F.B.) = 4 C.W.N. 656.

FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Rampini and Mr. Justice Harington.

IN THE MATTER OF ABDUR RAHMAN AND KERAMAT (*Petitioners*).*
[14th and 15th May, 1900.]

Charges—Joinder of—Offences of same kind not within year—Failure of Justice—Application of s. 537 *of the Code of Criminal Procedure—Power of Full Bench to send case back to referring Bench for final disposal—Rules of the High Court, Calcutta, Appellate Side, Chap. V, Rule* 5*—Code of Criminal Procedure* (*Act V of* 1898), *ss.* 233, 234 *and* 537.

Held, that s. 537 of the Code of Criminal Procedure can be applied to any case in which the trial has been held on charges joined together contrary to s. 234 of that Code.

In the matter of Luchminarain (1), *Queen-Empress* v. *Chandi Singh* (2) and *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (3) overruled.

[840] *Held* further that the language of Rule 5 of chap. V of the Rules of the High Court, appellate side, relating to references to the Full Bench in criminal matters, was sufficiently wide to enable the Full Bench to send the case back

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* Full Bench Reference in Criminal Revision No. 231 of 1900.

(1) 14 C. 128. (2) 14 C. 395. (3) 22 C. 176.

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27 C. 839 (F.B.) = 4 C.W.N. 636.

with the expression of their opinion upon the point of law raised to the Bench which referred it for final disposal.

[Overr., 25 M. 61 (P.C.) = 3 Bom. L.R. 540 (542) = 5 C.W.N. 866 = 11 M.L.J. 233 = 28 I.A. 257 ; Diss., 26 A. 195 (196) ; 29 B. 449 (467) = 7 Bom. L.R. 527 ; 14 Bur.L.R. 38 = 6 Cr. L.J. 28 = U.B R. (1907) Cr. p. 5 ; F., 28 C. 7 (9) ; 28 C. 1011 ; R., 15 C.L.J. 517 = 13 Cr. L.J. 609 (652) = 16 C.W.N. 1105 = 16 Ind. Cas. 257 (300).]

IN this case it appeared that the complainant, Khako manjhi, who was the ticcadar of the village of Butthana Kal, and several other manjhis who lived in the same village, had been greatly oppressed by the accused, Abdur Rahman, who was the manager of the Maharja of Gidhour, and his peons, one of whom was the accused Keramat Khan.

The first act of oppression was committed in Magh 1898, when all the cattle of the village of Butthana Kal ware taken for the purpose of being put into the pound by certain peons by the orders of the accused Abdur Rahman, although the cattle had done no damage to any property of the Maharaja. The complainant managed to recover the cattle before they reached the pound by promising to pay the accused Abdur Rahman Rs. 37 as a fine, and that sum was subsequently paid up by the complainant in two instalments.

The second act of oppression took place in the beginning of 1899, when the complainant was severely beaten with shoes by the orders of the accused Abdur Rahman and was ordered to pay Rs. 3 as diet money, which he did on the following day.

The third act of oppression was committed on the 7th February 1899, when all the cattle of the village of Butthana Kal were, by the orders of the accused, Abdur Rahman, seized by the accused Keramat Khan and others and placed in the pound ; they also seized two of the manjhis who followed the cattle and took them to the cutcherry of the Maharaja at Nagree, where they were severely beaten by both the accused and others and made to execute a bond for Rs. 200.

The accused were tried by the Joint Magistrate of Monghyr. Abdur Rahman on a charge (1) under s. 384 of the Penal Code of extortion committed on 1st February 1898 ; (2) under s. 384 of the Penal Code of extortion committed on 7th February 1899 ; (3) under s. 323 of the Penal Code of voluntarily causing hurt on the same date. Keramat was tried only on a charge of the last two [841] offences. Abdur Rahman was acquitted of the offence committed on 1st February 1898.

Both accused were convicted by the said Joint Magistrate on the 28th of February 1900 of the offences committed on 7th February 1899. Abdur Rahman was sentenced to undergo rigorous imprisonment for one year and eight months and to pay a fine of Rs. 500; Keramat to undergo rigorous imprisonment for ten months. The accused appealed to the Officiating Sessions Judge of Bhagulpur, and *inter alia* contended that as it was not certain that all the occurrences happened within one year, and as all the persons accused were not charged with each offence, they should not have been tried jointly. On the 14th March 1900 the appeal was dismissed and the convictions and sentences under ss. 323 and 384 of the Penal Code were affirmed. On revision it was contended under the authority of *In the matter of Luchminarain* (1) and *Queen-Empress* v. *Chandi Singh* (2) that the trial was altogether illegal and void by reason of the addition of the charge for the offence committed on 1st February 1898, and that as held in *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar*(3)

(1) 14 C. 128. (2) 14 C. 395. (3) 22 C. 176.

this could not be cured by s. 537 of the Code of Criminal Procedure. The Judges composing the Criminal Bench of the High Court (Prinsep and Handley, JJ.,) doubting the correctness of these decisions referred the matter to a Full Bench on the 3rd May 1900.

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The order of reference was as follow :—

In this case two persons were tried by the Magistrate. Abdur Rahman was tried on a charge—(1) of extortion committed on 1st February 1898 : (2) of extortion committed on 7th February 1899; (3) of voluntarily causing hurt on the same date. Keramat was tried only on a charge of the last two offences. So far as the first-mentioned offence, it could not properly be tried in the same trial (s. 234, Code of Criminal Procedure) with the other offences as they were not committed within one year. Abdur Rahman was acquitted of that offence, but the accused were both of them convicted of the other offences committed on 7th February 1899. On their appeal to the Sessions Court the case was restricted to those offences.

Objections have been taken on revision under the authority of *In the matter* **[842]** *of Luchminarain* (1) and *Queen-Empress* v. *Chandi Singh* (2), that the trial was altogether illegal and void by reason of the addition of the charge for the offence committed on 1st February 1898; and that as held in *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (3), this could not be cured by s. 537, Code of Criminal Procedure. We venture to doubt the correctness of these cases. It seems to us that there was an irregularity such as it is the object of s. 537 to meet, and that s. 537 applies to such a case. As the learned pleader relies on *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (3), and as we believe, it has been generally understood, the learned Judges held that by reason of the words in s. 537 "subject to the provisions herein before contained," that section was inapplicable to matters, such as the present, dealt with in previous parts of the Code. It seems to us that by such an interpretation s. 537 would practically be inoperative. On the other hand, if those words be interpreted as referred to the previous sections of the Code contained in the same chapter (chapter XLV), which expressly deals with the same subject, providing for orders which are void, and not necessarily void for some reason stated, s. 537 would be useful, and we are inclined to think that this was the object and intention of the Legislature.

The matter which we therefore submit for consideration to a Full Bench is, whether s. 537, Code of Criminal Procedure, can be applied to any case in which the trial has been held on charges joined together contrary to s. 234.

There are several points which arise and have to be decided should the decision of the Full Bench be in the affirmative, which we do not think it necessary to set out.

Sir Griffith Evans (with him Mr. *Mahmud-al-Huq* and *Maulvi Mahomed Ishfaq*), for the petitioners. I submit this case belongs to a class of cases in which your lordships would have to infer a failure of justice from the nature of the case itself. With regard to the joinder of charges s. 233 of the Code of Criminal Procedure is the substantive section, the sections mentioned therein are in the nature of exceptions to that section. Unless this case can be brought within the provisions of s. 239 of the Code, which I submit, it cannot, Keramat could not have

(1) 14 C. 128. (2) 14 C. 395. (3) 22 C. 176.

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been tried with Abdur Rahman and there has been a distinct contravention of s. 233. The words "subject to the provisions hereinbefore contained" in s. 537 refer to the provisions [843] hereinbefore contained in this Code and not only to those in that chapter.

I submit that where there is an appointed method of trial and the prisoner is deprived of it there is a failure of justice. I must, however, admit no objection was taken until the appeal.

Before Keramat was called upon to plead the Magistrate added a charge against Abdur Rahman with respect to an occurrence in 1898 and both accused were tried together and Keramat got the benefit of the evidence given against Abdur Rahman. The Magistrate should have charged each separately and tried them separately. Section 537 does not cure the defect of persons tried jointly where they should have been tried separately.

Section 195 of the Code says that no Courts shall take cognizance of certain offences except with previous sanction or on complaint, the prohibition is also express under ss. 196 and 197. There is express provision in s. 537, cl. (*b*), that want of sanction under s. 195 shall not invalidate any sentence or finding, but the prohibitions in the other two sections are not covered by s. 537, and want of sanction or complaint with regard to them would be fatal and not cured by s. 537.

Take the proviso to s. 452, if the person not being an European British subject desires to be tried separately under that proviso and is tried jointly with an European British subject, would the Court on revision read the evidence to see whether he was rightly convicted or not? Would they not rather say he ought to be tried according to law?

In s. 461 a separate trial is provided for, and s. 537 does not cure any defect there, whereas in this case, where a certain kind of trial is provided and the accused is tried in some other way, it is an illegality and the words "error, omission or irregularity" in s. 537 do not cure the defect. *In the matter of Luchminarain* (1), *Queen-Empress* v. *Chandi Singh*, (2), *Raj Chunder Mozumder* v. *Gour Chunder Mozumdar* (3); *Bishmi Banwar* v. *Empress* (4), *Ekram Ali* v. [844] *Queen-Empress* (5), *Queen-Empress* v. *Ramji Sajabarao* (6), *Empress* v. *Murari* (7), *Thomas Castro* v. *The Queen* (8), *Makin* v. *Attorney-General for New South Wales* (9), *The Attorney General for the Colony of New South Wales* v. *Henry Lewis Bertrand* (10).

Where the essential of trial are wanting, the defect cannot be cured by s. 537, *Queen-Empress* v. *Imam Ali Khan* (11).

The case against me are the following: *Queen-Empress* v. *Kutti* (12), *Queen-Empress* v. *Ramanna* (13), *Queen-Empress* v. *Mulua* (14), *Reg* v. *Hanmanta* (15).

OPINIONS.

1900, MAY 15. MACLEAN, C. J.—The question submitted for our consideration upon this reference is, "whether s. 537 of the Code of Criminal Procedure can be applied to any case in which the trial has been held on charges joined together, contrary to s. 234 of the Code of Criminal Procedure." From the statements on the reference, it would appear that

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(1) 14 C. 128. (2) 14 C. 395. (3) 22 C. 176. (4) 1 C.W.N. 35.
(5) 2 C.W.N. 341. (6) 10 B. 124. (7) 4 A. 147.
(8) (1881) L.R. 6 App. Cas. 229 (244). (9) (1893) L.R. App. (1894) 68.
(10) (1867) L.R. 1 P.C. 520 (534). (11) 23 C. 252. (12) 11 M. 441.
(13) 12 M. 273 (276). (14) 14 A. 502. (15) 1 B. 610.

the petitioner Abdur Rahman, was tried on a charge (1) of extortion committed on 1st February 1898, and upon two other charges, whilst the other petitioner Keramat was tried only upon the two latter charges. The reference states—and this has not been contested—that so far as the first-mentioned offence, it could not properly be tried in the same trial (s. 234, Code of Criminal Procedure) with the other offences, as they were not committed within one year; and the petitioners contend that the trial was illegal and void by reason of the addition of the charge for the offence committed on 1st February 1898, and that this illegality could not be cured under s. 537 of the Code.

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[845] Put shortly, the case raised by the petitioners is that inasmuch as, under s. 233 of the Code, for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately (saving the exceptions mentioned), and that, inasmuch as that course was not pursued in the trial of the present petitioners, what was done was illegal, and, if illegal, the illegality cannot be regarded as a mere error, omission, or irregularity under s. 537 of the Code; and, if so, that the latter section has no application to the case. That contention is admittedly based upon three decisions of this Court. *In the matter of Luchminarain* (1), *Queen-Empress* v. *Chandi Singh* (2); *Raj Chunder Mozomdar* v. *Gour Chunder Mozumdar* (3) cases, however, which are at variance, so far as the principle is concerned, with those which have been cited to us, and which are *Queen-Empress* v. *Kutti* (4), *Queen-Empress* v. *Ramana* (5) *Queen-Empress* v. *Mulua* (6), *and Reg* v. *Hanmanta* (7). But for the views expressed by the Judges of this Court, and which are entitled to every respect, I should scarcely have thought the point was open to very serious argument. The failure to try the charge separately was certainly an error, omission, or irregularity in the proceedings before or during the trial, an irregularity, however, to which no exception was taken by the accused at the time of trial. It might then have been taken. But, unless such error, omission or irregularity has occasioned a failure of justice, it is cured by s. 537. I am unable to accept the view suggested by the learned Counsel for the petitioner, that the error or irregularity was not in proceedings before or during trial, but in some proceeding *dehors* the trial altogether. I dare say it is my own want of appreciation, but I have not been able to follow that line of argument.

[846] To proceed to the cases upon which this application is based, I may point out, with regard to the first case of *In the matter of Luchminarain* (1), that the observations made by the late Chief Justice, Sir Comer Petheram, were not necessary for the purposes of the case then under consideration. It was a mere *obiter dictum.* But in the later case in the same volume the same learned Judge says at page 397: Under these circumstances we think that the trial was illegal, it having been a trial which is prohibited by the terms of the law as contained in s. 233, and we do not think that s. 537, which cures errors, omissions or irregularities, is intended to cure, or does cure, an absolute illegality."

But, if this view be well founded, s. 537 might as well be struck out of the Code, for every error or irregularity, in so far as it contravenes the provisions of the Code, is, in a sense, illegal, but it was to provide against these illegalities vitiating the proceedings that s. 537 was enacted, with, of course, the important reservation that, if the error or irregularity

(1) 14 C. 128. (2) 14 C. 395. (3) 22 C. 176. (4) 11 M. 441.
(5) 12 M. 273. (6) 14 A. 502. (7) 14 B. 610.

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occasioned a failure of justice, then the section was not to apply. If an Act of the legislature prescribes that a certain thing is to be done in a particular way, and it is not done in that way, the error, omission or irregularity in so acting is illegal, for the act has not been done as the law prescribes, but then s. 537 steps in and says the proceedings are not to be regarded as vitiated by such error, omission or irregularity, unless a failure of justice has been occasioned. It must be a question of degree in each case. If the error be such as to have occasioned a failure of justice, then s. 537 does not cure the defect; but, if it was not of such a nature, then it does. The question of whether or not the act was illegal or not cannot be the true test. The illustration given to the section itself exemplifies this. It says: "A Magistrate, being required by law to sign a document, signs it by initials only, that is purely an irregularity, and does not affect the validity of the proceedings." In not signing with his name, the Magistrate, in strictness, acted illegally; but, though he acted illegally, it is none the less an irregularity which can be cured under s. [847] 537. For these reasons I respectfully decline to follow the decisions in this Court which have been referred to.

Apart from the questions of whether or not the language of s. 233 of the Code is directory only—as to which there may be something to be said—it is quite clear that, in this case, there was merely an error, omission or irregularity in the proceedings within the meaning of s. 537 of the Code, accepting, as I do, for this purpose the argument of Sir Griffith Evans, that the words "subject to the provisions hereinbefore contained" appearing at the commencement of the section, apply to all the preceding provisions of the Code, and not merely to the provisions of the chapter in which that section appears.

I do not propose to deal with a variety of cases which have been cited, many of them dealing with questions of Criminal practice and procedure in England. They do not appear to me to be very, if at all, pertinent. We have the Code before us, and what we have to do is to construe the Code and ascertain to the best of our ability, what the legislature meant. I entertain no doubt what it meant, or that the question submitted to us must be answered in the affirmative. I may, perhaps, add that my view appears to me to be strongly supported by the explanation to s. 537, which is a new addition to the Code.

With respect to the procedure we should adopt in disposing of the case, the language of rule 5 of chap. V of the Rules of the High Court, appellate side, relating to references to the Full Bench in criminal matters, is sufficiently wide to enable us to send the case back, with this expression of our opinion upon the point of law raised, to the Bench which referred it, for final disposal. And this will be done.

PRINSEP, J.—I am of the same opinion. I have no doubt that misjoinder of charges can be dealt with under s. 537 of the Code of Criminal Procedure, and in the consideration of such a matter, the Court will be bound by the terms of the concluding portion of the section and the explanation. It seems to me that s. 233 of the Code does not bar the application of this section. No doubt, it has the appearance of expressing the law as mandatory in this respect, so as to require that every distinct offence of which [848] any person is accused shall form the subject of a separate charge. But this section could not be otherwise expressed, and the fact that the word 'shall' has been used in s. 233 does not bar the application of s. 537 of the Code, if a subordinate Court should have acted in contravention of the terms of s. 233. I may observe, too, with reference

to such a case that the rule we propose to follow is that which has long been the practice of this Court. That practice has been interrupted by the cases in Indian Law Reports, 14 Calcutta. In a case in which on facts found, an offence which has not been charged has been committed, this Court has always considered whether the conviction could be altered to one of that offence. The Court would in such a case, consider whether the accused had had full opportunity to defend himself against such a charge. If he had not, a fresh trial from that point would be ordered. So, in a case like that before us, when there has been a misjoinder of charges, the Court would consider whether, on the evidence in respect of the offences which could be properly charged, the accused could and should be convicted, and whether the misjoinder has so far prejudiced the accused as to have occasioned a failure of justice. In the latter event a fresh trial would be ordered. The proceedings would not, however, be bad in law so as to make them null and void. For these reasons I agree with my lord the Chief Justice in answering the question referred to this Full Bench.

1900 MAY 15. — FULL BENCH. — 27 C. 839 (F.B.) = 4 C.W.N. 656.

GHOSE, J.—I agree in answering the question referred to the Full Bench in the affirmative.

RAMPINI, J.—I am of the same opinion. The irregularity that has occurred in the trial of this case appears to me not to be an illegality which renders the proceedings altogether null and void, but one which can be cured by s. 537 of the Code of Criminal Procedure.

HARINGTON, J.—I am of the same opinion. The English cases which were referred to are useful as disposing of the contention that the trial of a man on several charges at once was such an essential unfairness as to necessarily involve a failure of justice. It was never so held in England, and to this day, in cases of misdemeanour, it is the common practice to try a man for several misdemeanours on the same indictment. **[849]** We start, therefore, with the position, that the trial of a man for several offences on one indictment was not such an essential unfairness as to amount to a failure of justice. Has s. 233 of the Code, then, had the effect of making that which is not *prima facie* fatal to the fair trial of the prisoners, a fatal bar to the fair trial of the prisoners who are tried in breach of it? I do not think that s. 233 has had that effect; and if it has not had that effect, it amounts only to an irregularity, which comes within s. 537 of the Code. For this reason, I agree in thinking that this question should be answered in the affirmative.

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JUNE 6.

APPELLATE CIVIL.

27 C. 849.

27 C. 849.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Harington.

KAMESHWAR PERSHAD (*Plaintiff*) *v.* THE CHAIRMAN OF THE BHABUA MUNICIPALITY (*Defendant*).*
[29th May and 6th June, 1900.]

Bengal Municipal Act (III of 1884 *as amended by Act IV of* 1894 *B. C.) ss.* 85, *cl. (a),* 87, 114, 116—*Municipal Taxation—Assessment—Appeal against assessment—Jurisdiction of Civil Court to set aside an Assessment—" Circumstances and Property within Municipality "—Capability and Circumstances of the Assessee—Specific Relief Act* (I of 1877), *ss.* 42, 45.

As assessment of tax under s. 85, cl. (*a*) of the Bengal Municipal Act (III of 1884 as amended by Act IV of 1894, B. C.) made in consideration of the assessee's "circumstances and property " (altogether or partly) outside the local limits of the Municipality is *ultra vires* and illegal ; and the Civil Court has jurisdiction to set aside such an assessment.

Manessur Das v. *The Collector and the Municipal Commissioners of Chupra* (1) distinguished. *Navadip Chandra Pal* v. *Purnanand Saha* (2) referred to.

[**F.**, 35 C. 859=7 C.L.J. 631=12 C.W.N. 709; **R.**, 16 Ind. Cas. 449 (452)=8 N.L.R. 107; **D.**, 37 C. 374 (376)=11 C.L.J. 400=14 C.W.N. 437=5 Ind. Cas. 321.]

THE plaintiff, who is a zemindar of considerable means [850] and a resident of Benares, recently purchased a small house within the Municipality of Bhabua (in the Sub-Division of Bhabua, District Shahabad). This house was taxed at Rs. 2-8-0 per annum previously to his purchase; and it could be let at an annual rental of Rs. 30. He has also some landed property within the said Municipality, yielding an income of about Rs. 200 per annum. Besides these two properties he owns no other property or holding within the local limits of the said Municipality, but has considerable property beyond those limits.

It appears from the list of assessment prepared under s. 87 of the Bengal Municipal Act (III of 1884 as amended by Act IV of 1894, B. C.) that the Municipal Commissioners of Bhabua assessed the plaintiff's income at Rs. 10,000 per annum and imposed upon him the highest tax (*viz.*, Rs. 84 per annum) allowed under s. 85, cl. (*a*) of the said Municipal Act, taking into consideration the plaintiff's *capability*, circumstances and property.

The plaintiff presented in due time an application to the Municipal Commissioners objecting to the assessment as made on a wrong principle, and prayed for a reduction of the tax. But the Commissioners rejected his application. Thereupon the plaintiff instituted this suit to have it declared that the said assessment was *ultra vires* and illegal—the tax having been imposed upon him in consideration of his " circumstances and property " outside the Municipal limits ; and to have the assessment cancelled as made upon a wrong basis or principle.

The Chairman of the Bhabua Municipality contested the suit and pleaded, *inter alia* :—

(1) That the Civil Court had no jurisdiction to set aside an assessment of Municipal tax, and to declare it illegal.

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* Appeal from Appellate Decree No. 1375 of 1898, against the decree of F. H. Harding, Esq., District Judge of Shahabad, dated the 13th of April 1898, reversing the decree of Moulvie Ali Ahmad, Munsif of Sasseram, dated the 13th of September 1897.

(1) 1 C. 409. (2) 3 C.W.N. 73.

(2) That the proceedings of the Commissioners in making the assessment were in accordance with law.

(3) That the plaintiff, though a resident of Benares, carried on money-lending and zemindary business through his servants, who occupied the aforesaid house or "holding" within the Municipality.

[851] (4) That the plaintiff lent about Rs. 5,700 to persons residing within the limits of the Bhabua Municipality, and several thousands of rupees to persons residing in the Bhabua Sub-Division in which the Municipality is situate, and these transactions were carried on by his servants.

(5) That the plaintiff had been properly assessed regard being had to his *capability*, possession and circumstances.

The Munsif held that the Municipal Commissioners exceeded their power under the law in making the assessment, and it was therefore *ultra vires* and illegal, that the plaintiff should have been taken to be an ordinary person possessed only of those two properties within the Municipality, shorn of any other source of profit that he might possess outside the Municipality; and that a suit would lie to set aside such an assessment. And he accordingly gave judgment for the plaintiff.

The District Judge, on appeal, was unable to find that the Commissioners acted without, or in excess of their jurisdiction. He was of opinion that the plaintiff occupied the said small house within the Municipality, as a kind of head-quarters for his servants, who conducted zemindary and money-lending business on his behalf—a circumstance which might not improperly be taken into consideration by the Commissioners while making the assessment; that the Commissioners could not be said to be wrong, if they made a distinction between a person in receipt of a limited income in the shape of a pension or an annuity and a person carrying on business of various kinds for his own profit, though they might occupy holdings of the same class; that the present suit being virtually an objection to the amount assessed would not lie, regard being had to the provisions of ss. 114 and 116 of the Bengal Municipal Act, and to the decision in the case of *Manessur Roy* v. *The Collector and Municipal Commissioners of Chupra* (1); and that the Commissioners were authorized by law to consider the *purpose* for which the holding was occupied by the plaintiff, in assessing him according to his "circumstance and property within the Municipality." And he reversed the judgment and decree of the first Court and dismissed the plaintiff's suit.

[852] The plaintiff appealed to the High Court.

1900, MAY 29. Babu *Umakali Mukerjee* and Babu *Kulwant Sahai*, for the appellant.—The question is whether the Civil Court has jurisdiction to set aside an assessment (of tax) made by the Municipal Commissioners under the Bengal Municipal Act. If the Commissioners exceed the law in making the assessment, the Civil Court has every right to interfere and declare the assessment to be contrary to law. Section 45 of the Specific Relief Act (I of 1877) gives jurisdiction to the High Courts, and s. 42 of the same Act gives jurisdiction to the Mofussil Courts, to interfere in a matter like this. The income on which the tax is assessed under s. 85 of the Bengal Municipal Act must accrue within the Municipality, and the person enjoying such income must reside within its local limits.

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(1) 1 C. 409.

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[GHOSE, J.—If you conduct your business at a place within the Municipality, would not that be a "circumstance" within the meaning of s. 85 of the Act?]

If it relates to matters outside the Municipality that would not. The "circumstances and property" must be within the Municipal limits, and it does not, therefore, necessarily follow that because I have a zemindary office within the Municipality, I should be assessed on an income accrued to me outside its limits.

[HARINGTON, J.—What position does the plaintiff occupy in the Municipality?] He has an office in the Municipality occupied by his servants; this cannot be said to be a "circumstance" which makes him liable to be assessed with the highest tax allowed under s. 85 (*a*) of the Act. The assessment is, therefore, *ultra vires*, and the Civil Court has jurisdiction to set it aside; *Navadip Chandra Pal* v. *Purnananda Saha* (1).

[At this stage, the hearing of the appeal was adjourned to send for the Proceedings of the Municipal Commissioners of Bhabua with reference to this matter.]

1900, JUNE 6. Babu *Umakali Mukerjee.*—It is admitted that the assessment list was prepared under s. 87 of the Bengal [853] Municipal Act. This list shows that the plaintiff was assessed on an income of Rs. 10,000; this assessment is *ultra vires*, inasmuch as the plaintiff has no such income within the municipality, and, therefore, the Civil Court has jurisdiction to declare that the assessment having been made on wrong principles cannot be enforced, notwithstanding the provisions of s. 116 of the Municipal Act. *Dwarka Nath Dutt* v. *Addya Sundari Mittra* (2), *Brindabun Chunder Roy* v. *The Chairman of the Serampore Municipality* (3). Section 42 of the Specific Relief Act and s. 11 of the Civil Procedure Code empower the plaintiff to bring a suit to set aside an illegal assessment.

1900, JUNE 6. *Babu Ram Charan Mitter*, for the respondent.—We have to deal with the statutory rights of the Municipal Commissioners in this case. Section 45 of the Specific Relief Act does not authorize the mofussil Courts to call in question the acts of the mofussil Municipalities. *Moran* v. *Chairman of Motihari Municipality* (4).

The initial qualification which makes one liable to be taxed, is that he must occupy a holding within the Municipality. The plaintiff does occupy a holding within the Municipal limits through his servants who carry on an extensive money-lending business there in his behalf.

When the Municipality assessed the plaintiff on an income of Rs. 10,000, he did not attempt to have the assessment reduced, but wanted to show that he was not liable to be assessed at all, because he did not occupy any holding within the Municipality.

[GHOSE, J.—The only question before us is, whether you have not assessed him with reference to his means, or income derived outside the Municipal limits?]

The Municipal Commissioners held after an investigation, that the plaintiff's income was Rs. 10,000 per annum and he in his appeal to the Commissioners under s. 113 of the Municipal Act did not dispute the amount of the assessment, but [854] wished to avoid the liability to be assessed. The decision of the Commissioners in a matter like this, being

(1) 3 C.W.N. 73.
(2) 21 C. 319 (324).
(3) 19 W.R. 309 (312).
(4) 17 C. 329.

final under s. 114 of the Municipal Act, no suit could be maintained to set aside the assessment.

Section 363 of the Act contemplates actions for damages or compensation, and not for questioning the validity of the acts of the corporate bodies: *Chunder Sekhur Banerjee* v. *Obhoy Churan Baghchi* (1).

[GHOSE, J.—What is the basis of the assessment as found by the District Judge?—] The finding of the District Judge amounts to this:—That the assessment was made on the plaintiff's income derived within the Municipality. The plaintiff has not shewn that he has been assessed on an income derived outside the Municipal limits, and, therefore, it can reasonably be inferred that he was rightly assessed. The Commissioners having acted *bona fide*, and in conformity with the provisions of the law, the Civil Court has no jurisdiction to interfere with their acts: *F. W. Duke* v. *Rameswar Malia* (2).

When the tax is leived under s. 85 of the Bengal Municipal Act, it is immaterial whether the assessee has any property or not within the Municipal limits, as long as he has the initial qualification, *i.e.*, a "holding" within the Municipality.

Babu *Umakali Mukerjee* was not heard in reply.

JUDGMENT.

1900, JUNE 6. The judgment of their Lordships was delivered by

GHOSE, J.—The suit out of which this appeal arises was the outcome of an assessment made by the Municipal Commissioners of the Bhabua Municipality, in the district of Shahabad, under cl. (*a*) of s. 85 of the Bengal Municipal Act III of 1884 as amended by Act IV (B.C.) of 1894. The object of the suit was to have it declared that the assessment was illegal, because the Municipal Commissioners, in making the assessment, and imposing the highest tax as allowed by s. 85, proceeded upon the basis of his "circumstances and property" outside the limit of [855] the Municipality. It appears that the plaintiff had recently purchased a small house within the Bhabua Municipality which had previously been taxed at Rs. 2-8 per annum. He seems to be a person of considerable means in Benares, where he resides, and he owns a certain share of the Municipal town Bhabua, which yields him, as it was found by the Munsif, Rs. 200 a year.

But it was alleged by the Municipality in their defence to this action that the plaintiff was in the habit of doing considerable business through his servants at the house which he had purchased; that he lent large sums of money to persons residing within the limits of the Municipality of Bhabua, and that his men were in the habit of receiving the collections of his zemindari, at the said place. And it was pleaded on their behalf that the Municipal officers in making the assessment proceeded in accordance with law, and that no suit would lie for the purpose of having the assessment set aside.

The Munsif laid down, amongst others, the following issues:—"*2nd.*—Can the suit be maintained in a Civil Court? *4th.*—Was there any irregularity in assessing the tax upon the plaintiff? *5th.*—Whether the tax should be assessed upon the property and circumstances within the Municipality only? *6th.*—What would be the proper amount to tax upon the plaintiff? *7th.*—What relief, if any, is the plaintiff entitled to?

(1) 6 C. 8.

(2) 26 C. 811.

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27 C. 849;

It will be observed that the fifth issue proceeded upon the assumption that the tax imposed upon the plaintiff had been assessed upon his circumstances and property, not only within the limits of the Bhabua Municipality, but also outside thereof; and one may well gather, referring to the judgments of both the Munsif and the Judge of the appellate Court, that one of the main contentions raised on behalf of the Municipality was that they were justified in imposing the tax upon the plaintiff with reference not only to his circumstance and property within the Municipality, but also his circumstances and property outside the limits thereof. The Munsif found that the action of the Municipality in making the assessment in question was *ultra vires* and therefore the suit would lie. He held, to use his own words that "from the written statement and evidence it is quite clear that the defendant Municipality has exceeded [856] its proper limits in assessing a tax upon the plaintiff." And later on, he observed: "I am of opinion that the defendant Municipality exceeded their power, and therefore the assessment was irregular." He was of opinion, upon the fifth issue, to which we have already adverted, that the tax should be assessed upon his circumstances and property within the Municipality only. He, however, held with reference to the issue as to the proper amount of tax to be levied upon the plaintiff, and what relief the plaintiff was entitled to, that be was not at liberty to determine what should be the proper amount of tax, and that the only relief that the plaintiff was entitled to, was a declaration that the assessment made by the Municipality was illegal and not binding upon the plaintiff.

Against this judgment, the Municipality appealed to the District Judge of Shahabad; and we might here observe that, if the case of the Municipality really was, as it has now been represented to us, that the basis of the assessment was the plaintiff's circumstances and property within the Municipality only, we should have expected that they would raise this particular ground in their petition of appeal presented to the District Judge, and that they would complain of the issues as framed by the Munsif. And looking at the judgment of the District Judge one cannot help saying that the bone of contention of the Municipality was, as regards the construction to be put upon the words "circumstances and property within the Municipality" occurring in cl. (1) of s. 85. The learned Judge has held, and we think rightly held, that the assessment should be made with reference to the circumstances and property within the Municipality and not outside the limits thereof. But he evidently thinks that what the plaintiff seeks to do in the present case is to have the amount of the tax imposed reduced, and that therefore, having regard to the case of *Manessur Das* v. *The Collector and Municipal Commissioners of Chupra* (1) a suit like the present could not be maintained.

In that case, certain houses had been assessed at Rs. 144 a year, and had so continued until the year 1873, when the tax [857] was raised to Rs. 216, though the value of the houses had not in the meantime increased, nor had any change of form been made. The person so taxed brought a suit complaining against the enhancement, and asked that this enhancement might be set aside; and it was held by this Court that the Municipal Commissioners having determined what was the annual tax to be levied on account of the houses in question, though they might have erred in doing so, a suit would not lie to set aside the order of the Commissioners, the object of the suit being to reduce the amount of the tax. But that

(1) 1 C. 409.

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is not the case here. The plaintiff questions the principle upon which the assessment was made, not so much as to the amount of the tax imposed. He says that in making the assessment the Municipal Commissioners had proceeded upon a certain basis, which could not under the law form the right basis of such assessment, namely, the circumstances and property of the plaintiffs outside the local limits of the Bhabua Municipality. As to the question whether a civil suit lies in a matter like this, we need only refer to one of the recent cases upon the point, namely, the case of *Nabadip Chandra Pal, Chairman of the Kamarkhali Municipality* v. *Purna Nanda Saha* (1), where it was held that "if the assessment made by the Municipal Commissioners be *ultra vires* there is nothing in the Act to prevent a rate-payer from seeking in a Civil Court a decision that the action on the part of the Municipality was *ultra vires*, and that the assessment is not binding upon him." We may, therefore, take it, if the ground of the action be correct, that the plaintiff was entitled to institute the suit that he did in order to have it declared that the assessment in question was *ultra vires*. The learned Judge of the Court below, however, about the end of his judgment, upon the question whether the Municipal Commissioners in the case had acted without jurisdiction or in the excess of jurisdiction, observes as follows: "I am of opinion that, the plaintiff-respondent occupying the house in question as a kind of head-quarters for servants who conduct zemindari and money-lending business on his behalf, is a circumstance which might not [858] improperly be taken into consideration by the Commissioners. I do not think that the Commissioners can be said to be wrong, if they make a distinction between a person in receipt of a limited income, in the shape, for instance, of a pension or an annuity, and a person who is carrying on business of various kinds for his own profit, although they may occupy holdings of the same class." This portion of the judgment would indicate as if the assessment made by the Municipality was upon the basis of the circumstances and property of the plaintiff within the Municipality only; but there is no evidence upon the record to support this position. If that were so, we should have had no hesitation in saying that the suit could not be maintained. But that was not what was found by the Munsif, who tried the case in the first instance. The judgment of that officer proceeded rather upon this, that the assessment was made partly, at any rate, with reference to the circumstances and property of the plaintiff outside the Municipality, and against this conclusion there was apparently no ground taken by the Municipality in the memorandum of appeal to the District Judge. But assuming for the purposes of argument that the learned Judge was right in holding that the Municipality in making the assessment in question did proceed upon the circumstances mentioned in his judgment, it is quite evident, having regard to the judgment of the first Court, and also having regard to the line of defence and the contention raised by the Municipality, both before the Munsif and the District Judge, that the assessment was made, at any rate, partly with reference to the circumstances and property of the plaintiff outside the local limits of the Bhabua Municipality. In this view of the matter we should think that the assessment was *ultra vires* and illegal. Section 85 of Act III of 1884; "The Commissioners may from time to time at a meeting convened expressly for the purpose, of which due notice shall have been given, and with the sanction of the

(1) 3 C.W.N. 73.

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Local Government, impose within the limits of the Municipality one or other or both of the following taxes: (a) A tax upon persons occupying holdings within the Municipality according to their circumstances and property within the Municipality: Provided that the amount assessed [859] upon any person, in respect of the occupation of any holding, shall not be more than eighty-four rupees per annum " and so on. Now the first condition, which the law imposes, is that the person to be taxed occupies a holding or holdings within the Municipality; and the second condition is that the taxation must be according to that person's "circumstances and property within the Municipality." And the whole question which had to be considered in this case was whether the Municipality had not in making the assessment in question proceeded upon the basis of the plaintiff's circumstances and property outside the Municipality of Bhabua. If they did so altogether or even partly, as it seems to have been the case, it is obvious that the assessment was *ultra vires*, and that the plaintiff was entitled to bring the suit that he instituted.

We may as well add that the contention that was raised by the plaintiff before the Municipal Commissioners, on appeal against the order of assessment, was that he was not at all liable to be taxed because he had not been residing in the house within the Municipality of Bhabua, which he had purchased. That ground no doubt could not be sustained, and the learned vakil on behalf of the Municipality has contended before us that the line of action taken by the plaintiff before the Commissioners would rather indicate as if, barring the particular question raised by the plaintiff before the Commissioners, the assessment had rightly been made. We are, however, unable to accept this contention as correct. No doubt his endeavour then was to show that he was not liable to be taxed at all, but it does not follow from this that he thereby accepted the principle of the assessment that was made, much less does it follow that he is not entitled to maintain the suit which he has brought.

The result is that the decree of the District Judge is set aside, and that of the Munsif restored, with costs.

B. D. B. *Appeal allowed.*

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27 C. 860.

[860] ADMIRALTY JURISDICTION.

Before Mr. Justice Ameer Ali.

IN THE MATTER OF THE STEAMSHIP "DRACHENFELS."
"RETRIEVER" *v.* "DRACHENFELS."
"HUGHLI." *v.* "DRACHENFELS."

[11th, 12th, 13th, 14th, 15th, 18th, 19th, 20th, 21st and 22nd December, 1899, and 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 22nd, 23rd, 24th and 25th January, 1900.]

Salvage—Service to a vessel in distress though not in imminent danger—Interruption of service by accident—Towage service convertible into salvage service—Distinction between towage and salvage service—The indicia of salvage service—Costs—Practice of the Court in giving costs.

Any service rendered to a vessel in a state of peril or risk or otherwise in distress, which contributes in some degree to its ultimate safety entitles the person rendering the service to salvage reward.

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It is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction, if the service were not rendered.

Services rendered to a ship which is in a normal condition, and has received no injury, and needs nothing more than expedition, or acceleration of progress, will be treated as mere towage; it is otherwise in the case of a vessel which is in a disabled condition or has received substantial injury. In considering the question whether the service was of the nature of salvage service, the risks of navigation, the difficulty under which it was performed, and the danger in performing it, have all to be taken into consideration.

An ordinary towage service may, in consequence of supervenient danger, be converted into salvage service; but the right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct, or gross negligence on the part of the salvors. The mere fact that the service was interrupted by accident or some like cause, if it has been productive of benefit to the owners of the vessels, will not disentitle the salvors from their reward.

In assessing the award the Court will take into consideration, not only the danger and difficulties to which the salvor was exposed, but also the skill with which the work was performed. The shortness of service may often be taken as showing extraordinary skill and labour.

When two separate salvage actions are consolidated at the instance of the common impugnant, and no order is made giving the conduct of both to one plaintiff, the promovents are entitled to separate costs. Practice of the Court followed, and costs given on the ordinary scale provided for in the rules under the Civil Procedure Code, and not under the schedule relating to Vice-Admiralty actions.

[R., 16 C.L.J. 467 = 17 C.W.N. 238 = 14 Cr. L.J. 5 (11) = 18 Ind. Cas. 149.]

[861] THE *Drachenfels*, a German steamship, left Calcutta on the 11th September 1899, and that same night at about 10 P.M. she discharged her pilot and stood out to sea, and on the 12th she met bad weather. She lost her rudder on the 13th and tried to get back to Calcutta to remedy the damage. She got back to near about the Eastern Channel only on the 18th, and at 2 P.M. on that day Mr. Cox, the pilot, went on board of her, and at about 8 P.M. she anchored not far from the Eastern Channel light. Next morning about 1 A.M. the tug *Hughli*, which had received information from another vessel regarding the condition of the *Drachenfels*, went down to her and enquired, if her services were required, which were accepted. At about 2-30 A.M. in the morning the tug boat was fastened by a hawser to the stern of the *Drachenfels* to act as a rudder, and steer her up the Channel towards Saugor. At one stage of the journey the hawser broke, but a little while after the *Hughli*, was again fastened to the *Drachenfels*; this time with two hawsers—one of them, the wire one, parted, but the coir hawser held, and the *Hughli* successfully did her work and brought the *Drachenfels* up to Saugor. For some reasons the hawser was thrown off and it was lost. There the two vessels remained at anchor on that day, *i.e.*, the 19th, and the *Retriever*, which had met them somewhere lower down, remained also in attendance at the request of Mr. Cox, who was acting for the captain of the *Drachenfels* during the whole time. Next morning at about 5-30 the two tugs were fastened to the *Drachenfels*, the *Retriever* on the starboard side and the *Hughli* on the port side, in order to tow her upon her journey towards Calcutta. The flotilla thus made up went up the river, till they came to a place called the Gabtolla Channel, which they entered by the usual track for ships, namely the No. 3 Track. After they had passed the lower Spar Buoy somewhere abreast of the Lower Black Cask Buoy the *Drachenfels* took the ground. On taking ground she heeled over to

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starboard, most of the lashings of the two tugs gave way; with some difficulty they got clear of the *Drachenfels*, and then moved off to get rid of the wreckage. After clearing the wreckage they came back to the assistance of the *Drachenfels*, where she had grounded fast. The *Retriever* attempted unsuccessfully to pass her a hawser, then the *Hughli* tried, but met with an accident to one of her propellers, which completely [862] disabled her from pursuing her efforts to help the grounded steamer. The *Hughli* was thus compelled to come up to Calcutta to have her propellers cleared, but the *Retriever* remained by, and next morning she pulled off the *Drachenfels* or assisted in pulling her off the sands on which she had grounded. The *Hughli* claimed that having regard to the condition of the *Drachenfels*, her position at the Sandheads, the risk to which she was exposed and other circumstances, the work which she performed was salvage work, and that she was entitled to reward on that basis.

The *Retriever's* case was that the danger to which the *Drachenfels* was exposed on the sands after she grounded was of an imminent character, and that the services, which she rendered to her, were such as entitled her to salvage.

The case of the *Drachenfels*, on the other hand, was that she was in no danger at all at the Sandheads, that she could have remained anchored there with safety and drifted up the channel without any assistance from the *Hughli*. The allegations of the *Hughli* regarding the nature of the work done by her, the character of her services and so forth were disputed. It was also urged on behalf of the *Drachenfels* that the grounding was due to misconduct on the part of the masters of the tugs, inasmuch as they did not keep the pilot in charge advised of the course they were pursuing. It was also contended that the *Drachenfels* could have got off by herself, if the pilot had come on board from the *Tigris*, to which vessels he had gone for the night, and that, as a matter of fact, she got off the ground on the next day by her own exertions.

The two cases for salvage reward promoted respectively by the owners, captains and crews of the steam tugs *Hughli* and *Retriever* against the steamship *Drachenfels* were consolidated at the instance of the latter ship by an order of this Court made on the 15th October 1898.

1899, DECEMBER 11. Mr. *Pugh* and Mr. *Zorab*, for the tug *Retriever*.

Mr. *Dunne*, Mr. *J. G. Woodroffe* and Mr. *Peacock*, for the tug *Hughli*.

Mr. *O'Kinealy*, Mr. *Hyde* and Mr. *Knight*, for the steamship *Drachenfels*.

Cur. adv. vult.

JUDGMENT.

[863] 1900, JANUARY 31. AMEER ALI, J.—These two cases for salvage reward promoted respectively by the owners, captains and crews of the steam tugs *Hughli* and *Retriever* against the German steamship *Drachenfels* were consolidated at the instance of the latter ship by an order of this Court made on the 15th October 1898. To the consequence of this order I shall refer by and by, but I cannot help expressing at this stage my regret at the inordinate length of the hearing and the amount of public time, which, in spite of every endeavour on my part to keep the discussions confined to the real issues, has been spent over non-essentials. One other remark seems to me necessary before going to the facts of the case.

It was open to the parties to ask for the appointment of assessors and as they have not chosen to do so, should I fall into any misapprehension with regard to any matter of technical detail, the responsibility must be theirs. 1900 JAN. 25. — ADMIRALTY JURISDICTION. — 27 C. 860.

The *Drachenfels* is a German steamship of about 900 H.-P., her nett tonnage being 1,573 or 1574 tons, and her gross tonnage 2,463. She left Calcutta on the 11th September, and that same night at about 10 P.M. she discharged her pilot and stood out to sea. On the 12th she met bad weather. Admittedly she lost her rudder on the 13th, which fact, according to the captain of the *Drachenfels*, was discovered only on the 14th. She then tried to get back to Calcutta to remedy the damage that had happened to her. She got back to near about the Eastern Channel only on the 18th, and at 2 P.M. on that day Mr. Cox, the pilot, went on board of her, and at about 8 P.M. she anchored not far from the Eastern Channel Light. If I remember aright Mr. Cox says it was about 2 miles to the S. S. E.

Next morning about 1 A.M. the tug *Hughli* which had received information from another vessel regarding the condition of the *Drachenfels*, went down to her and enquired, if her services were wanted. At present I am only giving the prominent facts, in order to explain how the case comes before me. I shall detail the other circumstances later on.

There was a conversation between Mr. Cox and the captain of the *Hughli*, of which there can be no doubt the captain of the *Drachenfels* was cognisant.

[864] The *Hughli's* services were required and were accepted, and at about 2 30 in the morning the tugboat was fastened by a hawser to the stern of the *Drachenfels* to act as a rudder and steer her up the channel towards Saugor.

There is no doubt that at one stage of the journey the hawser broke. What happened thereafter is a matter of controversy, as also the time when and the place where it took place. To these matters I shall advert presently. A little while after, the *Hughli* was again fastened to the *Drachenfels*. This time with two hawsers, one of them, the wire one, parted, but the coir hawser held and the *Hughli* successfully did her work and brought the *Drachenfels* up to Saugor, somewhere about 1-30. The hawser was thrown off at about 2-30, and for some reason, which is again in dispute, it was lost.

There the two vessels remained at anchor on that day namely, the 19th, and the *Retriever*, which had met them somewhere lower down, remained also in attendance at the request of Mr. Cox, who, I have no doubt, was acting for the captain of the *Drachenfels* during the whole time. Next morning at about 5-30 the two tugs were fastened to the *Drachenfels*, the *Retriever* on the starboard side, the *Hughli* on the port, in order to tow her up on her journey towards Calcutta. The *Retriever* is a bigger boat with stronger horse power than the *Hughli* and the *Hughli* appears, so far as I can gather from the evidence and the diagram which is in evidence, to have been lashed to the *Drachenfels* a little more forward than the sister-tug.

The *Drachenfels* was not to use her engines, until she got into a straighter channel. The flotilla, made up in the way I have described, went up the river, till they came to a place called the Gabtollah Channel.

The evidence for the promovents is that the flotilla entered the Gobtollah Channel by the usal track for ships, namely, the No. 3 Track, and after they had passed the Lower Spar Buoy somewhere abreast of the Lower

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Black Cask Buoy the ship took the ground. On taking ground she heeled over to starboard, most of the lashings of the two tugs gave way, with some difficulty they got clear of the *Drachenfels* and then moved off to get rid of the [865] wreckage. After clearing the wreckage, the evidence is, they came back to the assistance of the *Drachenfels*, where she had grounded fast. The *Retriever* attempted unsuccessfully to pass her a hawser; then the *Hughli* tried, but met with an accident to one of her propellers, which completely disabled her from pursuing her efforts to help the grounded steamer. The *Hughli* was thus compelled to come up to Calcutta to have her propeller cleared, but the *Retriever* remained by, and next morning she pulled off the *Drachenfels* or assisted in pulling her off from the sands on which she had grounded. These are the bare outlines of the case which have given rise to these two claims.

The *Hughli* says that, having regard to the condition of the *Drachenfels*, her position at the Sandheads, the risk to which she was exposed and other circumstances to which I shall refer in some detail, the work which she performed was salvage work or of the nature of salvage work, and that she is entitled to reward on that basis.

The *Retriever's* case is that the danger to which the *Drachenfels* was exposed on the sand after she grounded on the morning of the 20th was of an imminent character, and that the services, which she rendered to the disabled ship, were such as entitled her to salvage. It is unnecessary to refer here to the amount of the claims put forward by these two tugs.

Owing to the order of consolidation, which, as I have said before, was made at the instance of the *Drachenfels*, I am obliged to deal with these two claims in the same judgment with the consequence that in many matters I shall have to go from one to the other at the risk of complicating to some extent the discussion of the subject. It would have been preferable, if the two cases had been kept apart, for, as it seems to me, the claim of the *Hughli* is not connected with that of the *Retriever* or, if at all connected, it is so in a very remote degree; but owing to the order of consolidation the representatives of the *Hughli* have been obliged to be present during the trial of the case, for the *Retriever*, and *vice versa*. I now come to the impugnant's case. Her case on the other hand is that she was in no danger at all at the Sandheads, that she could have remained anchored there with perfect safety. It has even [866] been contended that she should have drifted up the channel without any assistance from the *Hughli*, and the allegations of the *Hughli* regarding the nature of the work done by her, the character of her services, and so forth, have been disputed, and disputed with a minuteness as to which I shall have to say a word or two. The *Drachenfels* also alleges that the grounding was due to misconduct on the part of the masters of the tugs inasmuch as, to paraphrase the contention, they did not keep the pilot in charge advised of the course they were pursuing. She also contends that the *Drachenfels* could have got off by herself that night, if the pilot had come on board from the *Tigris* to which vessel he had gone for the night, and that, as a matter of fact, on the next day, the 21st, she got off the ground by her own exertions. I must admit that, although this latter allegation is what I gather from the evidence of Captain Kennewig, the learned counsel for the *Drachenfels* did not go so far. He only contended that the *Drachenfels* by working her own engines contributed materially in getting herself off that morning from the place where she had grounded. The principles governing the right to salvage remuneration are now too clearly recognised to require any lengthy discussion. For the

purposes of the present case I may take it as a settled rule that any service rendered to a vessel in a state of peril or risk, or otherwise in distress, which contributes in some degree to its ultimate safety entitles the person rendering the service to salvage reward. Again the mere fact that the service was interrupted by accident or some like cause, if it has been productive of benefit to the owners, will not disentitle the salvors from their reward.

In the case of the *Camellia* (1) Sir James Hannen stated that principle thus: "I am of opinion that the principle laid down by Dr. Lushington and Sir R. Phillimore in the cases I have referred to, namely, that services which have contributed to the ultimate safety of a vessel, if interrupted before completion, without default of the salvor, are entitled to some remuneration, is applicable, not only to the case of a vessel saved from imminent risk of wreck, but also to a case like the present, where the vessel is [867] brought into a position of greater comparative safety than that in which she was when she asked for assistance."

It may also be taken as a settled rule that a mere towage service, or, as it is sometimes called, an ordinary towage service, may, in consequence of supervenient danger, be converted into salvage service. The circumstances under which a service of towage becomes superseded by the right to salvage is described in the case of the *Minnehaha* (2). But the right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct or gross negligence on the part of the salvors. In the case of the *Atlas* (3), it was laid down that such misconduct must be conclusively proved by those who allege it in order to work a forfeiture.

Bearing in mind these principles, which I have stated here in general terms, let us examine the facts relating to these claims. But before proceeding further I think it would be desirable to refer for a moment to the chart which shows the channel up the river from the Sandheads to the entrance of the Gabotollah Channel.

The distance between the Eastern Channel Light and Saugor, the place where the *Drachenfels* anchored on the 19th, is stated by the witnesses to be forty-five miles. The Pilot's Ridge marked on chart A is, I gather from the Imperial Gazetteer, 139·6 nautical miles from Calcutta *via* the Western Channel.

Hunter in describing the estuary of the Hooghly below Kulpi, which is 49·7 nautical miles below Calcutta, says thus: "The estuary of the Hooghly is famous for its dangerous and numerous sand banks, but they are subject to such great and rapid changes that any attempt at a minute description of them would be more mischievous than useful. The best known of them are the Gasper Sands and Saugor Sands." Leaving the Eastern Channel Light and passing the buoy between the Intermediate and Eastern Channel Lights we come to the Saugor Sands. Further up is the Lower Gasper and further up again is the Upper Gasper; we then come to the Middleton Sands and Long Sands. Bearing in mind [868] these places it would be as well to know exactly the width of the channel as described in the evidence.

According to Mr. Kirkman the distance between the Lower Gasper and the Long Sand Light is 12 miles, and from the Lower Gasper Buoy

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(1) (1883) L.R. 9 P. D. 27; 50 L.T. 126.
(2) (1861) 15 Moo. P. C. 133 = Lush. 335.
(3) (1862) 15 Moo. P. C. 329 = Lush. 518.

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to Middleton Sand is 6 miles. The width of the channel between the Lower and Upper Gasper varies from 3 to 1½ miles. At the Lower Gasper the available channel is about a mile, and between the Lower Gasper Light and the Station Buoy at the Upper Gasper, if I understand the evidence rightly, the channel is said to be ordinarily speaking half a mile or thereabouts.

Captain Best in his evidence says that the width of the narrowest part of the channel from the Lower Gasper to Saugor is about half a mile in places, and Mr. Kirkman says the most dangerous places along the route from the Sandheads to Saugor are to be found at the Gasper Sands, the Long Sands, the Middleton Bar, Middleton Spit and Saugor Flat.

There is one other circumstance disclosed in the evidence which must not be overlooked, *viz.*, what is stated by Mr. Kirkman, that the flood tide setting towards Saugor runs north at the Lower Gasper Station Buoy away from the Western Sands, but dead on to the Middleton Sands.

At this stage I think I may also call attention to the evidence of the witnesses who speak about the dangers of the Hooghly and what they consist in. Two of the witnesses called by the promovents state these dangers in explicit terms, and I do not think there can be any doubt as to their existence. Mr. Paine says the dangers of the Hooghly are strong tides, cross—currents, constantly changing depths and generally intricate navigation and that the sands are constantly altering, some of them very rapidly. He is corroborated by several other witnesses and not contradicted in any respect by the other side.

Keeping these facts as to the nature of the river in mind, let us see what was the condition of the *Drachenfels* on the 18th or morning of the 19th when she accepted the assistance of the *Hughli*. As regards the condition of the *Drachenfels* herself it is worthy [869] of note, that although Captain Kennewig tries to represent the vessel as not wholly disabled he admits that she was only partially under control. But the fact remains that she was 210 miles out when she discovered she had been disabled by the loss of her rudder, and it took her 5 days to make up the 210 miles and get within reach of the pilot brig.

Apparently she was first observed by Mr. Chase, who is totally unconnected with this case. and whose evidence I see no ground for disbelieving. Mr. Chase was struck by her movements which he describes in rather graphic terms. He says he remembers going as pilot on board the *Aglaia* in September 1898 and seeing the vessel which afterwards turned out to be the *Drachenfels*, that he saw the *Drachenfels* before he went on board the *Aglaia*, that he observed something which struck him as unusual. She was steering wildly, he went down to her in the *Aglaia* and when within hailing distance of her, he asked if he should send out tugs to her and that the reply was they would first like to consult their own pilot. They had no pilot on board at that time. He then returned to the pilot brig and reported the fact. He then towed down the pilot, Mr. Cox's boat, to the *Drachenfels*, and Mr. Cox, before he went on board the *Drachenfels*, asked him to send down two tugs to him; that on the way up he met the *Hughli* at Saugor and gave her certain instructions. Later on he met the *Retriever* to whom also he communicated similar instructions. In answer to the Court he says, speaking of the *Drachenfels*. " She was I think 3 or 4 hours in sight long before the *Aglaia* came into sight. We saw her masts opening out and closing in. We knew that she was steering a wild course. She was moving anything between E. S. E. and North; yes it was her erratic movements which caused me

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to go up to her." Then I asked him, if what he had said as to her not being under proper control, was an opinion formed from what he then saw of her movements. His answer is clear: "Yes especially when we got near her, I did not want to go close to her. She was steering so wildly. I had to make a long circle and come up behind her. That was her position in the open at sea. Her position in shallow water would be worse."

Captain Kennewig denies that he told Mr Chase anything with [870] regard to a tug or tugs. He says the only message or commission he entrusted him with was to inform the agents, Messrs. Graham & Co., that the *Drachenfels* had lost her rudder. On Mr. Chase's testimony I have no doubt that Captain Kennewig's statement is not correct and that what Mr. Chase states is true and likely to be true. It is very likely Captain Kennewig did not like to say anything as to whether the assistance of a tug or tugs was necessary, till he got his pilot on board, and it is in evidence that before Mr. Cox got on board the *Drachenfels* he commissioned Mr. Chase to send down two tugs to the assistance of the *Drachenfels*. So far as the actual condition of the *Drachenfels* is concerned, it appears clearly from the evidence of Mr. Chase, which is corroborated by that of Mr. Cox, the pilot. He states in examination-in-chief that she was not manageable, and though cross-examined at considerable length and with great ingenuity he has stuck to the statement that the *Drachenfels* when he took her in charge was wholly unmanageable. He says he would not have attempted to go up to Saugor without assistance, and the expert evidence called by the promovents supports the view that it would not have been possible for the *Drachenfels* to work up the river without the assistance of a tug.

No doubt there is evidence on the other side upon which it is contended, it was not only possible but would have been quite safe for the *Drachenfels* to go up the river without the assistance of the *Hughli* by dragging her own anchor and working her own engines. These are matters to which I shall refer later on.

Assuming her condition at that time to have been as is stated what would be her position working up the river without any assistance. As I have already pointed out, there are various places in the river which are extremely dangerous. The statements of Mr. Kirkman as to their dangers have not been contradicted, although Mr. Bellew, who has come forward on the part of the *Drachenfels*, traversed a large extent of ground to some of which I think it desirable to call attention.

The season of the year when these events took place was during the south-west monsoon, and the plaintiff's witnesses state that September is a most uncertain month regarding the springing up of cyclones, storms and changes in the weather. Mr. [871] Bellew says he would regard October as the most treacherous month in the year. Whether October is more treacherous than September or *vice versa* is a question better fitted for discussion in some debating club than in a Court of Law.

The question which I have to determine is whether there is any chance of the weather changing in September so as to expose a vessel in the condition of the *Drachenfels* to risk and danger.

The chart, which I have already referred, is issued under the authority of Government, and the notes thereon may be referred to as authoritative. I find one note, which is worthy of attention, worded thus: "Caution.—Owners of vessels are strongly advised not to risk their vessels laying at

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anchor awaiting orders at the Sandheads between the months of April and November inclusive. Vessels are recommended to go into Saugar roads, where there is a safe anchorage and telegraph station."

Apart from that note what are the facts which have been deposed to on both sides. In the first place I have the evidence of Captain Best and Mr. Durham, who were on the *Hughli*, of Mr. Cox, the pilot in charge of the *Drachenfels*. I have the evidence of several men from the pilot service who have been cross-examined at great length, but against whose testimony nothing has been shown to suggest that they have given their evidence with any interest in the case itself. One of them, Mr. Chase, saw the vessel at the Sandheads. Mr. Kirkman has piloted the *Drachenfels* before, and knows the capacity of the vessel. He and the others are thoroughly conversant with the dangers of the Hooghly and the difficulties of navigation in it. I have also the evidence of a gentleman in Government service, who does not appear to be in any degree interested in the case. I refer to Captain Waller.

On the other hand several witnesses have been called on behalf of the *Drachenfels*, one of whom is Mr. Bellew, who is a pilot of long standing and experience, but the manner in which he introduced himself into the case or became connected with it, in my opinion, detracts considerably from the value of his testimony. The circumstances are detailed in his evidence, and I shall not take up time by dwelling on them. It is enough to say [872] that I think learned counsel for the promovents were not unjustified in their comment that his evidence should be accepted with considerable reserve and qualification. Captain Lardner was another witness on behalf of the *Drachenfels*. His experience of the river Hooghly is not very large. He was a long time ago in charge of a steamer for only three months as third officer, and though he hazarded opinions on a variety of subjects, his cross-examination has led me to the conclusion that not only was he a strong partisan, but that I cannot attach much weight to any of the opinions he has expressed in the case.

With reference to Captains Ashby and Thomson I shall make a few remarks when I come to that part of the case to which their evidence relates. I shall only say here that they, to use their own language, did not pretend to have any knowledge of the river Hooghly, and whatever they said, they said with regard to their own experience on those smaller rivers they mentioned, and in connection with those smaller tugs of which they had experience on those smaller rivers.

So far as Mr. Bellew's statements are concerned, to my mind they largely corroborate what has been stated by the expert witnesses called on behalf of the promovents. In my opinion the promovents' witnesses—apart from those who were eye-witnesses to various facts—have given their evidence with great reserve and an absence of partisanship, and I think I may fairly place reliance on their evidence when I find that in many respects they derive corroboration, or, if not corroboration, support from what Mr. Bellew says. I shall explain what I mean. It was contended with considerable force that the *Drachenfels* could have lain at anchor at the Sandheads with perfect safety; that the weather was settled so to speak at that time; that a storm had prevailed for some days before, that is to say, from the 12th and had passed over, and upon Mr. Bellew's statement it was said there was no prospect of a storm for a more or less definite period; that not only could the vessel have remained there in safety, but she could, if she liked, have drifted up the river in the way

Mr. Bellew and Captain Lardner suggest. Mr. Bellew, however, says this, that he would not have done that himself, if he could have got assistance ; when pressed hard as to why he would not, he said, he would not [873] like to have " fiddled about,"—that is his expression,—for a week or thereabouts. Whether he would have liked to do so or not is not a matter for me to consider now.

The question for my consideration is whether he in any way suggests that the ship in the condition in which she then, was, did not require the assistance which she accepted and without which the other witnesses say she could not have got up to Saugor.

Mr. Cox, whatever his mistake, as to what occurred at the Gabtollah channel, if mistake it was, does not now at least appear to be in any way connected with the *Hughli* or the *Retriever*. If any case of bias was to be urged against him, I think foundation should have been laid for it in cross-examination, and, that not having been made, I think his evidence is not to be put aside without careful consideration. He says he wou'd not have ventured up the river, if assistance was not forthcoming ; and four other men, men who follow the profession of pilots on this river and who have to bring up vessels and who are presumably in a position which entitles their statements to credence, say, that it was impossible to bring up the vessel in the condition she was without the assistance which she received. Captain Waller, a Government servant, is express on that point and he says the same thing.

Why am I, merely on the theorising of a gentleman who is intimately connected with the conduct of this case, to put aside the whole of this evidence ? But it is said the ship might have remained there and in safety. Again there is the evidence of these gentlemen to whom I have referred. The only evidence I have on the other side is that of Mr. Bellew, for that of Captain Lardner does not touch the point. He has never had experience at the Sandheads of September weather. Mr. Bellew speaks, and speaks throughout with so many qualifications and reservations, that it is only necessary to refer to his evidence to see that he is a witness, whose testimony requires to be read with the greatest scrutiny. The witnesses for the promovents state that at any moment a storm might have sprung up and put the ship in peril. They describe those risks in their evidence and I do not propose to refer to them in detail. Mr. Bellew says that a storm having just passed over he [874] would not expect another for a fortnight or so. That is a statement of a most indefinite character.

Certain passages from a book by some one named, I think, Marshall, were referred to, to tell me what would happen in September. I have no way of testing the statements in that book. I can only say that the testimony of the witnesses called and examined in Court are, to my mind, more reliable and of far more use than hypothetical statements in a book, the authority of which is uncertain. But Mr. O'Kinealy's contention is that the ship when at the Sandheads was not in any imminent danger, so as to entitle the tug to salvage reward.

In the cases of the *Charlotte* (1) and the *Albion* (2), it is laid down that it is not necessary that the distress should be actual or immediate or that the danger should be imminent and absolute. It will be sufficient if,

(1) (1848) 3 W. Robinson, 68. (2) (1861) Lushington, 282.

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at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction, if the services were not rendered. And in the case of the *Chetah* (1) which was strongly relied on for the impugnants, where also another vessel had acted as a rudder steering the disabled vessel from astern, though the *Chetah* was in no imminent danger—on which ground the high salvage award given by the lower Court was reduced,—the Privy Council held that there was considerable risk to the vessel salved which would entitle the salving vessel to remuneration. The facts are thus stated in the report: The *Chetah* had on the 17th of March 1867 whilst on a voyage from China to London met with an accident to her rudder whereby she was disabled. The master and crew constructed a jury rudder, but before they had fixed it she was fallen in with by the schooner *Annie Grant*, and with her assistance the *Chetah* arrived off Waterford on the evening of the 27th of the same month. *Chetah* was sailing with the *Annie Grant* astern and steering her from behind. Dealing with the claim of the *Annie Grant* their Lordships say as follows: "After the most careful consideration of circumstances upon which the claim of the *Annie Grant* is founded and with an anxious desire [875] that the salvors should receive not merely a fair but a liberal remuneration for their services, their Lordships have come to a conclusion as to the value of the services rendered widely differing from that of the learned Judge of the Court of Admiralty." Then they say that the *Chetah* was not in that degree of peril which the learned Judge supposed. that "she had indeed lost her rudder but this loss might have been supplied by some temporary expedient for which there were materials on board. The most important element in a claim for high salvage reward, *viz.*, the imminent peril of destruction of the vessel to which assistance is rendered is therefore wanting in this case." But they go on to add: "That the *Chetah* was rescued from a situation of considerable peril by the exertion of the master and crew of the *Annie Grant* and by the application of proper means for securing her safety at a time when, being crippled by the loss of rudder, she would most probably, if not inevitably, have been driven on shore there can be little (if any) doubt, and the services of the *Annie Grant* have, therefore, been the means of saving very valuable property from impending destruction. That they are entitled to a high salvage reward it is impossible to deny."

In the case of The *Albion* (2) the possibility of danger was taken into consideration.

Similarly, in two cases in the Supreme Court here, in one of which the learned Judges carefully avoided using the word danger as being ambiguous, the risks arising from the possibility of bad weather were taken into consideration for the purpose of judging whether the services were in the nature of salvage or otherwise.

Bearing in mind then the risk of a change in the weather to which I have referred, and the consequences which might have resulted to the *Drachenfels* in the condition in which she was, if she had remained there during bad weather, I proceed to deal with the mode in which the work of steering the *Drachenfels* up the river was performed by the *Hughli*.

The work commenced about 2-30 A.M. and according to the evidence of the *Hughli* was interrupted about 9 A.M. somewhere about the Lower Gasper by the parting of the hawser which [876] fastened the *Hughli* to

(1) (1868) L. R. 2 P. C. 205. (2) (1861) Lushington, 282.

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the *Drachenfels*. According to Captain Kennewig and his witnesses the parting is said to have taken place about daylight. The reason of this divergence seems to me perfectly clear. If the parting was at daylight it must have taken place somewhere where the channel was very wide and there would be no risk of their coming to grief. If it parted about 9 A.M. it must have occurred as is alleged by the *Hughli* somewhere near the Lower Gasper Light and admittedly in a dangerous place and in a narrow channel, and it seems to me it was with that object that Captain Kennewig puts the parting of hawser at daybreak, and denies the statement of the *Hughli's* witnesses that it was three hours later. That the evidence of Captain Kennewig and his witnesses must be viewed with considerable suspicion is clear from the entries appearing in his logs, especially the rough log, and other circumstances to which I shall refer presently.

Captain Best, Mr. Durham and Mr. Cox all swear that the hawser parted about 9 A. M. as already stated, somewhere near the Lower Gasper. Both Best and Cox say the operation throughout the journey from the Sandheads to Saugor was attended with considerable difficulty, and that in the course of it both vessels were exposed to great danger. Captain Best says he had to steam out sometimes broad on the port quarter, sometimes broad on the starboard quarter and sometimes amid ships in order to steer the *Drachenfels* and that the hawser was carried away, because the *Drachenfels* gave a heavy steer and he tried to straighten her up. According to Captain Kennewig the hawser parted first because it was rotten and secondly because no chafing gear was put on in time. Captain Best and Mr. Durham say that chafing gear was used from the outset and that the hawser was not rotten and Mr. Cox says no complaint was made regarding the hawser being rotten nor did he perceive it to be so. My own impression is that the charge about the condition of the hawser was an after thought and made to minimise the value of the services rendered by the *Hughli*. So far as the difficulty and dangers of navigation are concerned, Mr. Bellew says in his opinion there would be no danger or difficulty, if the work was done with skill and care. According to him, therefore, care and skill would be needed for the purpose **[877]** of avoiding the dangers. Whatever the effect of his statements may be, the evidence of the other witnesses clearly shows that having regard to the nature of the channel and the other facts to which I have referred in connection with the navigation of the river Hooghly, the work performed was not of an ordinary kind, but was attended both with danger and difficulty and, if I may rely on that testimony, that it was performed with skill. Again I refer to the evidence of Captain Waller. It appears that this is the first case of the kind, *viz.*, of steering with the tug astern on the Hooghly and it was successfully performed. In considering the question whether the service was of the nature of salvage service, the risks of navigation, the difficulty under which it was performed, and the danger in performing it have all to be taken into consideration. It is contended that the work was merely to wage work. The distinction between to wage and salvage has been pointed out in a number of cases in which the Judges have held that where the ship is in a normal condition and nothing more is needed than expedition or acceleration of progress, that is towage. I refer especially to the case of *The Jubilee* (1). In the case of *The Reward* (2) it was also contended that the service rendered was mere towage. In that case the vessel had lost

(1) (1879) 42 L.T.R, 594. (2) (1841) 1 W. Robinson, 174.

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two of her best anchors and cables and the starboard end of the windlass and the bulkhead had been carried away. The learned Judge who decided that case said: " I apprehend that mere towage service is confined to vessels that have received no injury or damage and that mere towage reward is payble in those cases only, where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered damage or accident," and the services were remunerated as salvage.

In my opinion the services rendered by the *Hughli* helped in rescuing the *Drachenfels*, which was in a disabled condition, and being rudderless as she was, was exposed to risk, if she lay there at anchor, and which was unable to work up the river without assistance—from a position of risk and brought her into a position of comparative safety. The impugnants not satisfied with denying the principal facts on which the *Hughli* bases her claim [878] for salvage reward went into a variety of matters to show that the work done by the tug was improperly performed. It was suggested that instead of using one hawser of 75 or 80 fathoms she should have used two of 35 fathoms each. No question was put to Captain Best in the course of his cross-examination, which extends over 77 pages of printed matter, regarding this contention. No doubt when Mr. Cox was examined he was questioned whether it would not have been better, if two hawsers had been used. He said " No" and he gave his reasons and I accept those reasons.

Captains Ashby and Thompson spoke of two hawsers being used on various rivers in England and the continent, but they have no experience of the river Hooghly, and it is admitted by Captain Lardner that instead of the 7-inch hawsers used on those other rivers, 18-inch hawsers are in use on the river Hooghly. To expect that an 18-inch hawser should be slackened out and hauled in from time to time is, I judge from the expert evidence, absurd, and I see no reason to suppose that what Mr. Cox states is not well founded, namely, that the proper mode of steering the vessel was adopted in this case.

It was suggested that, if shorter and double hawsers had been used there would have been less sheer. This contention again has been answered by the witnesses for the promovents. Mr. Cox shows what would have happened and so do the other witnesses, especially Mr. Kirkman. These objections, no doubt, helped in prolonging the case, but to my mind they were absolutely useless in rendering any assistance to the Court to arrive at a conclusion whether the promovents are entitled to salvage reward or not.

With these remarks I proceed to the other part of the case.

From Saugor to the Gabtollah Channel where the *Drachenfels* grounded is said to be 8 or 9 miles. The Gabtollah Channel is described by some of the witnesses to be equally dangerous with the James and Mary or at least coming next to it. The shoals and sands are shifting there as throughout the worst part of the Hooghly. According to Captain Best the buoys on the eastern side of the channel serve to mark the edge of the channel in some way, but the sands jut out from the line of buoys. This evidence was elicited in cross-examination and I do not find it [879] contradicted. The sands are so shifting that they require continuous watching and sounding, and Mr. Bellew says that the soundings taken from time to time do not give any true indication of the water at the different places. That in brief is the state of the Gabtollah Channel.

That channel is usually entered by one of three tracks; No. 3 is said to be the best for ships of high draught, No. 2 is the next best, No. 1 is not used for ships. All these things have to be kept in view by vessels going up that channel.

It is in evidence that on the morning of the 20th under the orders of Mr. Cox the flotilla made up as mentioned before and being about 98 feet in width started from Saugor to enter the Gabtollah Channel. A controversy has raged about the hour at which the flotilla started and we have heard a considerable amount of examination and cross-examination as to the proper time at which it ought to have started. Mr. Cox says it was the proper time; Mr. Bellew does not venture to say it was not a proper time. He admits that the pilot was justified in starting at that hour, but he says: "Though I would have been tempted to start at that hour I would not have done so." It is difficult to understand his exact meaning, but I find there is no reason for saying that the hour was not proper. According to Mr. Bellew himself the water in both No. 2 and No. 3 tracks was more than sufficient for vessels of the draught of the *Drachenfels*. The tugs were working their engines; it is not necessary to consider at what speed they were working them. The *Drachenfels* as arranged was not working her engines.

It appears that after the Gabtollah Channel was entered, a British Indian Steamer coming the other way passed the flotilla and very shortly thereafter the *Drachenfels* struck. At that time the tide was running very strong and almost right across the channel in a north-easterly direction. Mr. Cox says the accident was due to his striking on a lump. A battle has raged round this question of the lump also. Captain Waller says he did not find a lump where it is suggested the *Drachenfels* must have struck. After striking on the lump or sand or grounding somewhere, the steamer according to all the witnesses went [880] over the sands and took up a position some 1,200 feet to the east of the eastern edge of the channel. To my mind whether the vessel struck on a lump or was drifted away, as is suggested by Mr. Bellew, by the action of the tide and in the endeavour to avoid the British India Steamer, out of the exact track she ought to have kept, is unimportant. The question is whether the masters of the tug were in any degree responsible for the mishap that took place either as to the time of starting or the navigation of the channel or otherwise. It is in evidence that the time of starting is absolutely at the discretion of the pilot. It is suggested that the accident would not have occurred, if the pilot had altered his helm in sufficient time. I do not wish to say any thing that would imply any error of judgment on the part of Mr. Cox but, assuming that he did not in sufficient time alter his helm, is there any thing to suggest that the captains of the tugs were in any way to blame or that they abstained from bringing any thing to the notice of the pilot, which they should have brought to his notice. The lead was going the whole time and, if I read the evidence aright, there was no deficiency of water found. It is contended that the tug masters ought to have kept in view the leading marks and the buoys, and to have seen that the pilot was keeping in No. 3 track. It is proved beyond a shadow of doubt that that is no part of their duty. They had their own work to attend to and to obey the orders of the pilot. If from any miscarriage of his orders any mishap had arisen, they would have been justly responsible. Mr. Bellew does not say it was their duty to keep on the look out and to guide Mr. Cox in the navigation of the vessel. Admittedly it would be impossible to give the charge of this flotilla to three different persons.

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Mr. Bellew admits that Mr. Cox, from what he knows of the man, must have been alive to the whole situation, and that he cannot suggest that any useful purpose would have been answered by his saying what he, after some pressure in cross-examination, stated he would have said to the pilot in spite of the rebuff which he would have anticipated.

Taking all the circumstances into consideration I find that nothing is brought home to the masters of the tugs to suggest that they left undone anything they were bound to do, or did anything [881] which they ought not to have done, which led to this result. It is not even shown that the course which was being pursued was not the right course. Various hypothetical suggestions are made that, if they had kept this and that in view they would have known, which way the flotilla was going, but nothing of any tangible character has been proved to justify my holding that there has been any negligence or misconduct on the part of the masters of the *Retriever* or the *Hughli*. After the vessel grounded and took the first roll she appears to have righted herself—even Captain Kennewig admits this—and after one or two other rolls she grounded fast. At this stage we have an independent witness on the scene. I refer to Captain Waller. He was at Kedgeree on his boat the *Tigris*. Kedgeree is about 38 nautical miles south of Calcutta. He came down towards the *Drachenfels* and saw her position. He describes how she was fixed there. He saw both the tugs not far off from her. The *Hughli* and the *Retriever* say that after the first roll most of the fastenings gave way, that there was apprehension of serious risk to both of them, so they severed the connection and cleared off, and that, after clearing the wreckage, they came back to the assistance of the *Drachenfels*. There was no abandonment of any kind on their part up to that stage. The *Hughli* says that her being on the port side of the *Drachenfels* to some extent contributed to her not capsizing at the first roll. Whether she did or did not is a matter of little moment in the decision of the case, though that also has formed a matter of long examination.

I myself am inclined to think from the expert evidence on behalf of the promovents that the *Hughli* must have contributed to some extent in keeping the *Drachenfels* from capsizing, but whether she did so or not is, to my mind, of small importance. Captain Waller saw both these vessels close to the *Drachenfels*. He saw the *Hughli* attempting to pass her hawser to the German ship and fail. As regards the *Retriever's* attempts to pass a hawser there can be no doubt and it is not disputed that she did try to do so; but the coming back of the *Hughli* to the *Drachenfels* and her endeavours to pass a hawser has been denied by Captain Kennewig and his witnesses. That the *Hughli* did come back and did attempt to pass the hawser has been conclusively [882] established and I must say I was astonished to see that so much time was taken up in the cross-examination of Captain Best on that point. I utterly disbelieve Captain Kennewig's denial.

The attempt of the *Retriever* was made first and Captain Arden says that it failed entirely, because no one on the *Drachenfels* was prepared to put out a line to take the hawser in. He is corroborated by Mr. Cox. On the other side is the evidence of Captain Kennewig alone. I am inclined to think, accepting the view suggested by counsel for the *Drachenfels*, that the denial of Captain Kennewig regarding the *Hughli's* attempt was due to inattention. But it shows that the accident had wholly demoralised the men on the *Drachenfels*, and that they were not ready to do anything to help themselves and were not ready to take in the hawser

brought to them by the *Retriever*. This attempt therefore failed. Just at the time when Captain Arden was taking in his hawser, the *Hughli* came up and appears to have anchored between the *Drachenfels* and the *Retriever* and then shifted her position again to a more appropriate place as described by Captains Waller and Best and Mr. Cox; she then sent out a boat with a hawser for the purpose of passing it to the *Drachenfels*. Captain Best describes the circumstances connected with it in his evidence. I will refer first to Captain Waller's deposition on this point. At p. 17 he says: "I could not tell how far the *Hughli* was from the *Drachenfels* when I first saw them. The two tugs were moving, when I first saw them, I thought they were manœuvring to get to her. When I saw her aground I thought the tugs were going to her assistance. There was a heavy rain squall and I could not see. I first saw the *Drachenfels* and the tugs after the rain squall. After I got up I was able to judge how far the tugs were from the *Drachenfels*. When I got up to the *Drachenfels* the *Hughli* was, I should say, 700 to 800 feet from the *Drachenfels*. I saw the *Hughli* go up to the *Drachenfels* and drop her anchor. Before that I could not see what she was doing. After that I saw she was trying to pass her hawser to the *Drachenfels*. There was a tow boat there, and I could see she was trying to get her hawser across. I was watching the manœuvre. I was 300 or 400 feet from the *Hughli* on the other side. I saw **[883]** the boat, having a cross tide, could not fetch the ship with the amount of line she had out. The cross tide was setting her about N. N. E. It was away from the *Drachenfels*. They were paying out the hawser on board. The tide caught the hawser and drove it under the *Hughli* and it caught the propeller."

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Captain Best and Mr. Durham describe what happened so far as they saw. Captain Arden also speaks to the incident. Just then there was some movement on board the *Hugli* which led to the fouling of the starboard propeller. Captain Best in his evidence says at p. 17:—"We slacked away the line and the boat rowed towards the steamer, towards the *Drachenfels* and got very near the *Drachenfels*, until the line was all out. Then we paid the wire hawser out, attached to the tow line to which the small wire was attached as well. They did not fetch the ship. They might have thrown a rope to the boat from the ship, but they were not paying much attention. Any how they did not do it."

Q. Then what happened?

A. "After that the wire got foul of the starboard propeller of the *Hughli*."

Q. What caused that?

A. "The wire being so heavy it went right down. The boat could not take the wire out. The coils of the wire from the coils on deck would not open out straight, there being no strain on it, and the wire being heavy sank and fouled the propeller."

Mr. Durham in his evidence says that he was attending to the paying out of the hawser and that it was some movement by the tug which led to the mishap. In answer to the Court in answer to the question "Having regard to the position of the tug to the *Drachenfels*, would that be the right position to let out the line?" He said: "In my judgment that was the right position." If the starboard propeller was going astern there would be risk; knowing the starboard propeller was not going at that time there was no risk or danger."

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Captain Waller in answer to the following question "When [884] you saw the boat taking the hawser across to the *Drachenfels* was there anything you saw that it did in connection with the hawser that was wrong?" he said, "No," and then he went on to add that the only possible way of conveying the hawser from the *Hughli* to the *Drachenfels* was by a tow boat and that the fouling of the propeller was the fault of no one and he puts it down to the strength of the current. Mr. Cox says it was not a necessary consequence of the manœuvring that took place that the hawser fouled the propeller. After the propeller was fouled, Captain Waller and the others say it was impossible for the *Hughli* to render any assistance and so she came up to Calcutta.

The contention on the other side is that the fouling of the propeller was the fault of the *Hughli*.

Upon a careful consideration of the evidence I have come to the conclusion that the view expressed by Captain Waller is correct; that it was the fault of no one but a pure accident owing to the action of the tide taken perhaps with the manœuvring for the purpose which Captain Best mentions.

Then it is in evidence that after the *Retriever* had left the place in order to haul in her hawser the *Drachenfels* put up a signal asking her not to abandon her. This signal was hoisted after she was on the sands and when the captain saw the tugs going away.

The position of the *Drachenfels* at that time, according to Captain Waller and all the witnesses—both those present and the experts—seems to have been one of considerable danger. Captain Waller says he boarded the *Drachenfels* at 1-40; she had a heavy list then to starboard. He could not state the extent of the list, but she kept going over as the tide fell. His vessel was hanging by the *Drachenfels*. She was 400 or 500 yards off. Mr. Cox being asked, if there was any danger to the *Drachenfels* being hard and fast, says: "Yes, in danger of breaking her back."

Asked as to the position of the *Drachenfels* in the afternoon he said: "The list was gradually getting more and more with the ebbtide. The sand was gradually working away from her starboard side and giving her a bigger list;" and then he describes the various steps taken to get away from the ship. "The [885] sickmen were taken on board the *Retriever*. As the list went on increasing, it was deemed advisable to remove the men. One sick man went in the boat with me, when I went to the *Retriever*."

Mr. Bellew stated that there was no danger of capsizing though there might be other dangers; but, if his evidence is carefully analyzed, it will be seen that he also, like Captain Lardner, was forced to admit that the *Drachenfels* was in a position of great peril at that place, so much so that Captain Waller, a witness wholly unconnected with the case, says he advised both the captain and the pilot of the *Drachenfels* to leave the vessel, and that the captain of the *Drachenfels* did as a matter of fact send over two sick men he had on board—one to the *Tigris* and the other to the *Retriever*—and a great portion of his belongings; and although Captain Kennewig suggests the lascars and the crew left without his express sanction, I have no doubt on the evidence that that is not true. That they were allowed to go by him in consequence of the danger to which the ship was exposed is perfectly clear.

Mr. Cox details conversations with Captain Waller and Captain Arden as to the attempts to float the ship at night and he says they all came to the conclusion it would be most dangerous to make any such endeavour. Captain Arden details a conversation with Mr. Cox regarding the showing of a blue light on the *Drachenfels* which he would take as a signal to him that all the men on board the ship had left and that, on seeing that light if the ship capsized, he would not make any attempt to save the crew from drowning. Mr. Cox corroborates that statement. Captain Kennewig denies it, and says he was not told about any such arrangement. He admits, however, he did as a fact go over with all his European crew to the *Tigris*, but says, later in the evening he returned to his vessel with some of his men and that when the water rose he made an attempt to float the vessel and he showed a blue light and whistled to induce the pilot, who was on the *Tigris*, to return to the *Drachenfels*. He denies various other circumstances deposed to by Captain Arden, Mr. Cox and Captain Waller. It is material now to consider what Captain Waller says at page 6 (evidence taken on commission).

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"At the time the Captain was leaving with these 5 or 6 men [886] both the pilot and I advised him not to go on board. We told him why, for fear of the vessel capsizing. That was why he took the anchor to anchor the boat close to the ship. He took the light, the anchor and the awning, because he wanted to keep a watch on the ship. He said he wanted to keep close to his ship. He said he was going to anchor near her to see that no one would take the ship, that is to see that no one would go on board and claim her. In my opinion there was no chance of getting the ship off that night * * * I said you can't do anything with her to-night. The pilot said the same thing. He said he could not do anything that night. The Captain did not say anything to the effect that he hoped to get her off that night or that there was any likelihood of getting her off that night. I did not hear the Captain ask the pilot to go along with him. The crew of the *Drachenfels* remained on board my vessel the whole of that night. The ship's boats were lying astern of me all night with the exception of the one boat the Captain went away in. I saw a blue light that night between 12 and 1 o'clock. It was burning on board the *Drachenfels*." Asked his reason for thinking that they could not get the *Drachenfels* off that night he said: "It was dirty weather; she could not have got off without the tug and the tug, if she had come that night, would most likely have got aground herself. It was a dark night, very dark and rainy with occasional squalls."

I need not refer to Captain Arden's evidence. They all swear it would have been most dangerous to have attempted to float the ship that night, and beyond that Captain Arden and Mr. Cox both say there is a Government rule against anything of that sort being done at night. Mr. Bellew admits the existence of this rule, but he says in spite of it he would have made the attempt on the ground that necessity overrides all rules. Putting aside the evidence of the other pilots—men of as great experience as Mr. Bellew—that it would not have been safe, I have the testimony of Captain Waller who was on the spot, who knows the place and the kind of weather and the difficulties of the situation and who says that it would not only have been difficult, but dangerous to attempt it that night. I think I ought to accept the story of the arrangement to which Captain Arden and Mr. Cox have deposed regarding the shewing of a blue light.

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[887] Whether any attempt was made by Captain Kennewig on that night to float his ship or not, I am satisfied on the evidence of Captain Waller, Mr. Cox and Captain Arden that there was no change in her position the next morning. There is no reason suggested why I should disbelieve Captain Waller when he says he found her next morning in exactly the same place.

Mr. Cox says that next morning at his suggestion Captain Kennewig signalled to the *Retriever* to come within hailing distance which she did, and that, after considerable manœuvring, she got into a proper position, passed the hawser and pulled the steamer off. Captain Kennewig says:—"In my opinion, if the *Drachenfels* had not worked her engines in the way she did, she would not have got off on that occasion." In other words his case is that very little assistance was rendered by the *Retriever*. On the other hand I have the evidence of Captain Waller and Captain Arden who say that the *Drachenfels* could not have got away from that place without the help of the *Retriever*. He says, "She would have broken her back or capsized" Captain Waller goes further. Asked "In your opinion was the *Retriever's* position on the sand, when she got into position for towing, a position of danger?" He answered "She was putting herself very close to the sand. I think she was running a danger, running a risk, her stern getting aground. The consequences might have been that she might have lost her rudder or her propeller. Yes, the *Retriever* succeeded in passing a hawser to the *Drachenfels* on this occasion and commenced towing. I don't remember at what time she commenced towing. The *Drachenfels* was nearly upright when the *Retriever* began towing. I could not say at what angle; she was nearly upright. She had a slight list to starboard still. I was then about 1,000 feet away from her at that time. She never changed her position at all from the early morning. She never moved until the tug pulled her." Asked, "In your opinion was the position of the *Drachenfels* on the 21st a position of peril and danger?" He says "Yes." Asked "In your opinion could she have come into the channel without the assistance of the *Retriever*?" He answered "No, never. It was impossible." He was cross-examined at considerable length, but he adhered to his opinion. The same view is expressed by the other witnesses for the [888] promovents. Mr. Bellew suggest she could have remained there, until the spring tides set in again, by which time cargo boats would have been sent down and the ship could have been lightened. His cross-examination shews the danger to which cargo boats, if forthcoming, would have been exposed. I have, however, very little hesitation in holding upon the evidence, I have referred to, that the *Drachenfels* would before the next spring tides have broken her back, capsized, or, as Captain Lardner says, gone deeper into the sand.

The next question which I have to consider is whether the *Retriever* in performing her work exposed herself to danger and whether it was performed with skill under difficulties.

Captain Waller describes the difficulties to which the *Retriever* was exposed, and he mentions the dangers to which she subjected herself.

Mr. Paine (who was not present, but was called as an expert) corroborates him. I need not refer to the evidence of Mr. Cox and Captain Arden.

Regarding the skill required for the work, Captain Waller says it was the best bit of towing he had ever seen. Mr. Kirkman, a witness of considerable experience, says the same thing. Mr. Paine says in cross-examination that he does not think the *Drachenfels* rendered any

material assistance to the *Retriever* in pulling her off, and that in his opinion the tug could have got the *Drachenfels* off without any assistance from her as the *Retriever* had reserve speed.

Having regard to all these circumstances I hold that the work performed by the *Hughli* was of the nature of salvage and that she is entitled to salvage reward for the services she rendered ; and that the services rendered by the *Retriever* on the 21st were of a meritorious character.

The only question that remains for me to consider is what would be a proper award to make in the two cases.

The *Hughli* asks for £5,000 and in her demand she includes £100 for towage on the 20th.

This towage was undoubtedly not ordinary towage. All the witnesses describe it as of a dangerous character and there can be **[889]** no question that it was of an extraordinary character, but it is unnecessary to go into this further, for I think it would be convenient to assess the reward generally so as to include the services rendered on the 20th as well as the compensation for the damages suffered.

To refer the question of damages to the Registrar would be only putting the parties to unnecessary expense. I think, giving the case my best consideration, that Rs. 20,000 to the *Hughli* to cover everything would be the most appropriate award. As regards the *Retriever* she has already obtained various sums for towage services and the damages done to her. I think a sum of Rs. 30,000 would be the most appropriate sum for her.

The work occupied only a short time, but shortness of service has often been taken as shewing extraordinary skill and labour.

I assess the remuneration on the value of the ship *Drachenfels*, its cargo and freight which has been agreed to by the parties to come to Rs. 7,28,000. I also keep in view the respective value of the *Hughli* and the *Retriever*.

I have been addressed on the question of costs by counsel for the *Hughli* and the *Retriever* on the one side and Mr. O'Kinealy on the other. The plaintiff's counsel applied that I should give costs under the schedule relating to Vice-Admiralty actions, but it is clear upon the practice of this Court since the case of the *Dacca* (1) decided by PHEAR, J., in 1875 and which has been consistently followed in all subsequent Admiralty actions that costs will be given on the ordinary scale provided for in the rules in accordance with the Civil Procedure Code. SALE, J., in the *Falls of Ettrick* (2) gave costs on the ordinary scale and I propose to follow the same course.

The plaintiff's counsel contend they are entitled to separate costs. Mr. O'Kinealy contends they are not so entitled especially in view of the consolidation order of the 15th of October 1898. I have carefully considered the order made by the learned Judge on the application of the *Drachenfels* for the consolidation of these two matters, and I am of opinion that that order was made, **[890]** as it was asked for, with the object of avoiding a double set of costs to the impugnants. It was never intended so far as I can gather from the words of the learned Judge, and his remarks to Mr. Orr, that the conduct of the two actions should be given to one set of promovents. In the order of the 15th of October as well as of the 17th of May, both promovents are allowed to cross-examine

(1) Unreported. (2) 22 C. 511.

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the witnesses separately, and having regard to the course which the two actions have taken, both in the examination of the witnesses before the Commissioner as well as in Court, it would be hardly justifiable on my part to give only one set of costs. Mr. Best was cross-examined by the impugnants, as I pointed out before, at extraordinary length. I am forced to make this comment; not satisfied with one answer, counsel returned to the charge over and over again.

The impugnants raised every possible objection against the claim of the plaintiff, the result of which has been an inordinate prolongation of the hearing.

I think this is a case in which I am bound to give separate costs, and and I do so.

The learned counsel for the impugnants said that the claims of the promovents were exorbitant. In one case Rs. 84,000 were asked for, and in the other over a lakh and as the Court has now awarded in the case of the *Hughli* one-fourth of that claim, and in the case of the *Retriever* one-third, I ought to follow the precedent as laid down in the case of the *Champion* (1), in which the appellate Court directed that all costs incurred by the impugnants for giving security should be deducted from the costs, and I am informed that in this case the Chartered Bank gave the Bond.

On one side it is contended that the plaintiffs would not accept the security offered by Graham & Co. That is denied. I am not in a position to judge which statement is correct. Had the position been exactly similar I might have been induced to follow the case of the *Champion* (1) but in the present case I find there was no tender of any kind. I find also that Captain [891] Kennewig denies every circumstance connected with the plaintiffs' claims and I have found that in every particular he has been, to put it mildly, telling untruths.

No doubt the plaintiffs have appraised their services at a higher figure than I have, but it does not follow from this that their claims are exorbitant. Keeping in view the deliberate and obstructive conduct of the captain of the *Drachenfels*, I think it would be only fair to give the plaintiffs the costs which have always been awarded in these Admiralty cases, that is on scale 2. I may mention that in the *Falls of Ettrick* (2), the claim of the *Chusan* was 40 per cent. and SALE, J., only gave 10 per cent. and costs followed. He also gave the *Warren Hastings* much less than she asked for. He allowed her costs of hearing and other costs which had been incurred by her separately.

The plaintiff's counsel urge that, considering the length of the trial and the number of experts called on account of the objections raised by the *Drachenfels* as to the risks she incurred and other questions which she raised, the Court ought to give special directions. I appreciate that argument and think it would only be right to give the directions in the terms of the rule.

I hold that the fees ordinarily allowed under Rules 10, 14, 16 will not be sufficient to indemnify the plaintiffs against the costs incurred by them, and I accordingly direct that the Taxing Officer should exercise his discretion in allowing the costs under these heads on the special scale. I also leave it to him to say what amount should be paid to the expert witnesses, as I have nothing before me on which I can decide this question.

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(1) 17 C. 84. (2) 22 C. 511.

The plaintiffs are entitled to reserved costs including the costs of the commission, except as to the adjournment of the 27th July. The *Hughli* is to pay the cost of the *Retriever* of and incidental to that application for adjournment.

Attorneys for the tug *Hughli*: Messrs. *Orr, Robertson and Burton.*

Attorneys for the tug *Retriever* : Messrs. *Pugh and Co.*

Attorneys for the Steamship *Drachenfels*: Messrs. *Morgan and Co.*

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[892] CRIMINAL REVISION.

Before Mr. Justice Prinsep, Mr. Justice Ameer Ali and Mr. Justice Stanley.

LALDHARI SINGH AND OTHERS (*1st Party, Petitioners*) v. SUKDEO NARAIN SINGH AND ANOTHER (*2nd Party, Opposite-Party*).*
[28th, 29th March and 7th and 14th May, 1900.]

Ownership of land, dispute as to—Collection of rents—Zemindars and tenants versus *rival zemindars and tenants—Necessary parties to proceedigs under* s. 145 *of the Code of Criminal Procedure—Parties concerned, meaning of—Omission to add necessary parties—Addition of parties during proceedings—Revision and alteration of character of such proceedings by succeeding Magistrate— Jurisdiction of Magistrate—Revision, power of High Court to interfere—Code of Criminal Procedure*, ss. 145, 429—*Charter Act* (24 *and* 25 *Vic. c.* 104), *cl.* 15.

The words in s. 145 of the Code of Criminal Procedure, " parties concerned" in a dispute do not necessarily mean only the parties who are disputing, but include also persons who are interested in or claiming a right to the property in dispute. It is the duty of the Magistrate on the materials before him to ascertain so far as he can, who are the persons interested in or claiming a right to the property in dispute and to give notice to them all, so that the whole matter so far as his Court is concerned, may be disposed of in one proceeding.

Ram Chandra Das v. *Monohar Roy* (1) and *Protab Narain Singh* v. *Rajendra Narain Singh* (2) followed.

Where there was a dispute as to the ownership of lands between certain zemindars and their tenants on the one side and other zemindars and their tenants on the other, and the real matter for determination was not merely which of the two parties of zemindars were entitled to collect the rents of the lands, but also which set of rival tenants was entitled to hold actual possession of the lands and in a proceeding under s. 145 of the Code of Criminal Procedure the zemindars only were made parties and not the tenants. *Held* (AMEER ALI and STANLEY, JJ.,) that the tenants were necessary parties to the proceeding and the omission to make them parties went to the root of the case and was an illegality affecting jurisdiction which would justify the High Court in setting aside the order. PRINSEP, J.—The omission to join the tenants could not vitiate an order as between the zemindars on an objection that it was without jurisdiction and that no question of jurisdiction [893] arose in the matter. The High Court's powers are under the Charter Act, and these could be exercised only in respect of jurisdiction.

Where a Magistrate recorded proceedings under s. 145 of the Code of Criminal Procedure and his successor on the same materials revised those proceedings altering their entire character, converting the dispute, which was originally stated to be a dispute regarding the actual possession of the land into a dispute regarding the collection of rent between the persons named therein :—

Held (AMEER ALI and STANLEY, JJ.), that it was an abuse of jurisdiction on the part of the Mgistrate so as to alter the proceedings, and an abuse which

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* Criminal Revision No. 110 of 1900, made against the order passed by M M. Chuckrabutty, Esq., Sub-Divisional Magistrate, of Jahanabad, dated the 29th of December 1899.

(1) 26 C. 188. (2) 21 C. 29.

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would justify the intervention of the High Court under the powers conferred by the Charter. AMEER ALI, J.—The High Court has the power to interfere both under its revisional jurisdiction as also under cl. 15 of the Charter.

Hurbullubh Narain Singh v. *Luchmeswar Prosad Singh* (1) referred to.

[F., 28 C. 446 (450)=5 C.W.N. 429 ; Appl., 38 C. 883 (891)=12 Cr. L.J. 408=11 Ind. Cas. 592; R., 24 A. 443 (445)=22 A.W.N., 111 ; 28 C. 709 (717) ; 30 C. 155 (185—190) ; 33 C. 68=2 C.L.J. 241 (243)=9 C.W.N. 1046 ; 5 C.W.N. 900 (903) ; 6 C. W.N. 101 (103) ; 6 Cr. L.J. 113=7 P.R. 1907 Cr.=11 P.L.R. 1908=24 P.W.R. 1907 Cr. ; 2 L.B.R. 239 (241) ; 5 O.C. 1 (2) ; 23 P.R. 1902 (Cr.)=135 P.L.R. 1902.]

IN this case proceedings were instituted under s. 145 of the Code of Criminal Procedure, upon a police report submitted by the Sub-Inspector of Arwal, dated the 22nd of July 1899, to the effect that there was a dispute as to the actual possession of certain lands "between Babu Laldhari Singh of Bharathpura (1st party) and Babu Sukhdeo Narain Singh of Narga (2nd party) . . . through their respective tenants. . . Hence there is likelihood of a breach of the peace. . . at the instigation of. . . the servants and tenants of Babu Laldhari Singh they (*i.e.*, the Babu of Narga and the Babu of Bharathpura) have now raised these disputes. . . Under these circumstances I fully believe that both parties will create a disturbance at the time of cultivating the said disputed lands or offer opposition to the cultivation thereof on behalf of one of the parties." Upon receipt of this report the Sub-Divisional Magistrate of Jahanabad issued an order on the 22nd of July 1899 under s. 145 of the Code of Criminal Procedure calling upon Laldhari Singh and Sukhdeo Narain Singh to appear before him. The order recited *inter alia* that "it appears from the report of the police that there is a dispute as to the actual possession of about 42 bighas 6 cottahs 7½ dhurs of land comprised in various plots, &c., between Babu Laldhari Sing and Babu Sukhdeo Narain Singh through their respective tenants." The Sub-Divisional Magistrate was transferred and the case was taken up on the 12th of August by his successor, a Joint Magistrate. [894] Previous to the 12th of August written statements had been filed by both parties. In their written statements the first party put forward the objection that the case could not proceed, unless the tenants mentioned in the report of the police and the other proprietors were made parties as being parties concerned in the dispute. The Joint Magistrate altered the proceedings, first by the inclusion of the names of the three brothers of Laldhari Singh in the first party, secondly by changing 'actual possession of' to 'collection of rents in' and that Prayag Narain Singh's name should be included in the second party. Accordingly an order was drawn and passed which was entitled "revised proceeding," by which after reciting that it appeared that there was a dispute between the parties named in the original order and the added parties "regarding the collection of rents in about 12 bighas 6 cottahs and 7½ dhurs of land, etc.," the several parties were required to appear and file written statements of their "respective claims as regards the facts of actual possession of the subject of dispute." On the same day the first party filed a written statement in which the objection as to parties previously raised was repeated, and a further objection was taken that there was no dispute about the collection of the rent of the land, the subject of dispute. The Joint Magistrate overruled the objection of the first party, and in the absence of the tenants of either

(1) 24 C. 55.

party as party to the proceedings decided that the disputed land was in the possession of the second party.

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Mr. *Jackson* (with him Mr. *Hill*, Babu *Saligram Singh* and *Moulvie Syed Shamsul Huda*), for the petitioners.

The Advocate-General (Mr. *J. T. Woodroffe*) (with him *Moulvie Mahomed Yussuff* and *Moulvie Mahomed Ishfaq*), for the opposite party.

JUDGMENTS.

1900, MARCH 29. PRINSEP, J.—The matter before us relates to a rule in which we have to consider an order passed by the Magistrate under s. 145, Code of Criminal Procedure. By the order passed under s. 145 (1) proceedings were taken in regard to a dispute as to the "actual possession" of certain specified land between Laldhari Singh and Sukdeo Narain Singh through their respective tenants, the Magistrate being satisfied that this dispute [895] was likely to lead to a breach of the peace. This Magistrate was afterwards succeeded by another Magistrate in the Subdivision of Jahanabad, and he by an order of the 12th August purporting to be also under sub-s. (1) and reciting the same information declared the dispute to be also between other persons. Together with Laldhari Singh, the Magistrate joined the minor brothers of Laldhari of whom Laldhari was the guardian, and, together with Sukdeo Narain Singh he added Prayag Narain Singh. The Magistrate also declared that the dispute between these parties which was likely to cause a breach of the peace was regarding "the collection of rents of the lands" specified in the previous order. After hearing the evidence the Magistrate has declared possession to be with Sukdeo Narain Singh and Prayag Narain Singh.

The objections taken which have been argued before us on this rule by Mr. Hill on one side and the learned Advocate-General on the other arise from the terms of the order of the 12th August last. It is, first of all, contended that the Magistrate was not competent to add parties to the original order, and that the order of the 12th August was not in substitution for the former order, but for the express purpose of making such persons parties to the case. In the next place, it is contended that the new parties were not concerned in the dispute which gave rise to these proceedings and that there was no information before the Magistrate on which he could hold or, to use the words of the law, be satisfied that such persons were concerned in such dispute. Objection is also taken to the form of the order finding actual possession as between the contending parties who are zemindars, whereas the real dispute is between two sets of tenants who claim to be respectively in possession of the land, each set as tenants of one of the contending parties.

In regard to the first objection, it may be pointed out, that the proceedings which have given rise to this rule, were drawn up expressly on the petition of Laldhari Singh. He was one of the parties in the original order and he was mentioned in the police report as being the most prominent person on one side in the dispute likely to cause a breach of the peace. There can be no possible objection, therefore, to Laldhari Singh as a party to [896] the proceedings. The persons who are added at his instance were his own minor brothers, co-sharers with himself and under his guardianship in the management of their affairs, and, without any objection on his part, evidence has been taken and the case has been conducted to a termination with all these persons as parties. It seems to me, therefore, that an objection cannot now be properly raised on his behalf. If, on the other hand, it is considered as being raised on behalf of

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his minor brothers, I am of opinion that it is equally untenable. Laldhari Singh being their guardian and manager of their estate must be regarded as acting on their behalf in all matters connected with their property and, in the present instance, it appears that he was acting on his own behalf and also in the interests of his brothers in asserting their claim to the possession of the land in dispute. In the next place, I regard the order of the 12th August as the real order in this case and I consider that, by passing it the Magistrate intended to substitute it for the previous order of the 22nd July, which, in his opinion, was defective. There can be no objection to such a course.

It is, however, contended that the new parties whom I may for convenience sake, term the added parties, were not concerned in the original dispute, for they are not mentioned in the police report as so concerned. This objection has already been answered in respect of the minor brothers of Laldhari. It is, however, valid in respect of Prayag Narain Singh who has been joined with Sukdeo Narain Singh, as second party and, therefore for this reason, the final order passed under s. 145 can be regarded as only in favour of Sukdeo Narain Singh.

Mr. Hill lastly contends that the entire proceedings are bad, because the tenants who are really the contending parties have not been brought into this case, and he suggests that difficulties may arise, if the present order, as between the two zemindars, be maintained, inasmuch as such order, being passed behind the back of the tenants, could not affect their rights and interests. I can see no objection to an order under s. 145 being passed as between two zemindars who are in dispute within the terms of that section.

[897] The tenants' rights in no way can fail with those of the zemindars, who, it is stated, put those tenants on the lands and who have identical interests with them. In what way the order declaring the possession of one of these zemindars may affect these tenants it is not our duty in this case to consider, nor does the fact that the tenants were not made parties affect the validity of the final order under s. 145 as between the zemindars. If we consider the nature of the proceedings under s. 145 this will I think be evident. The Magistrate was satisfied from the police report that the dispute between the zemindars regarding the possession of the lands was likely to cause a breach of the peace, and he has, as between them, in order to prevent a breach of the peace, found which of the zemindars is in possession. It may be that the police report on which he acted also shows that the tenants under each of these zemindars were also in dispute, but he was not bound to consider that dispute, if he thought that a settlement of the disputes between the zemindars was sufficient to prevent a breach of the peace, and I am unable to see, as it has been suggested, that the exclusion of the tenants from these proceedings in any way affects their validity as to the dispute between the zemindars or affects the jurisdiction of the Magistrate. Whether a Magistrate institutes proceedings under s. 145 is a matter entirely for his discretion, and he is in no way bound to act on all that is stated on the police report before him. Here he appears to have thought that a settlement of the disputed possession between the zemindars would be sufficient to avert the apprehended danger to the public peace. If the Magistrate should find that a dispute between the tenants is still likely to disturb the peace, he can take fresh proceedings in the matter. Experience has however amply shown that in a matter of this kind where the dispute between the zemindars

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is settled, the persons claiming to be tenants accept the order passed and seeing that their interests have been represented by the zemindars under whom they claim, this result necessarily follows in nearly every case. If, however, the tenants on either side still hold out the Magistrate has a further remedy.

Again, it may be observed, that in the police report it is [898] clearly shown that though the tenants were the parties actually in dispute they were backed by their respective zemindars and I take it that it cannot be said that the zemindars were not at least equally parties of this dispute.

Lastly, I do not consider that the objection raised is *bona fide.* It was no doubt raised by Laldhari, who has obtained this rule in the earliest stage of this case, but it does not appear that any objection has been raised by the tenants themselves and as I have already stated it may be held that the rights of the tenants to hold possession already with them may still remain. Whether that be so is a matter that may require determination. But when as between Laldhari and the other zemindar it has been held that he is not in possession, it is not open to him to question the validity of the proceedings, because his tenants are no parties to the case. He could have proved that he was in possession through his tenants and in this he has failed. His object is clearly to get another opportunity through his tenants of re-opening the case.

There is another objection suggested which I must notice. In the first proceedings the Magistrate stated that the cause of dispute was *actual possession.* In the second he has stated it to be *the right* to collect rents from the land in dispute. If this be regarded as within sub-s. (2), this is an error, for a dispute regarding the right to collect rents considered as a dispute regarding actual possession within the terms of the section is obviously the landlord's right to the rents payable by certain persons in actual occupation as tenants, and sub-s. (2), as I understand it, is intended to show that constructive possession through the collection of rents is the actual possession which may be determined in proceedings under s. 145. But the words used by the Magistrate though misapplied may have been used to mean that the matter in dispute, which he had before him, was the possession of the zemindar by the collection of rents from tenants in possession by occupation of the lands, and in this sense, I think that they may be accepted, that it was so intended and accepted is shown by the written statements put in by the zemindars, by the evidence offered and taken, and by the judgment of the Magistrate. For these reasons I am of opinion that this objection is untenable.

[899] I have studiously abstained from any reference to the evidence in this case, because a case under s. 145 is not one with which we can deal as a Court of revision under the Code of Criminal Procedure. Such cases are expressly excluded from our cognizance as a Court of revision under that Code. Our powers are under the Charter Act and these can be exercised only in respect of jurisdiction. Dealing with the objections from this point of view I think that the rule should be discharged.

In my opinion no question of jurisdiction arises in this matter. The case is between two sets of zemindars each claiming possession and the dispute as between them can be decided by the Magistrate. It is moreover for the Magistrate to determine who are the parties to the dispute likely to cause a breach of the peace, and to settle the dispute as between them. It is not for the High Court in revision to say that such an order will not finally settle that dispute, because other persons claiming to be tenants under those zemindars have not been made parties to those proceedings, for

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it may happen that the tenants alone are not to the satisfaction of the Magistrate shown to be likely to break the peace. The omission to join the tenants cannot, in my opinion, vitiate an order as between the zemindars on an objection that it is without jurisdiction; nor is it for the High Court in revision to say that the Magistrate should have been satisfied that the tenants were likely to break the peace. The object of proceedings is to keep the peace by removing the cause of dispute. If it should so happen that a dispute between the tenants is likely to cause a disturbance of the public peace, a remedy is still open to the Magistrate. Evidence of possession can be obtained through the possession of the tenants and it can also be obtained through the right of the zemindar to put those tenants on the lands in dispute, and as to the value of the evidence derived from proceedings taken before the Collector it should be borne in mind that they were tendered on behalf of the petitioner, and, therefore, the Magistrate was called upon to determine whether they were admissible as evidence, and if so, how far they affected the matter in issue between the zemindars.

I have not considered the evidence or the manner in which it has been dealt with, as that is a matter, which as a Court of revision, we cannot consider.

[900] STANLEY, J.—The proceedings in this matter were instituted under s. 145, Code of Criminal Procedure upon a police report of the 22nd of July 1899, to the effect that there was a dispute as to the actual possession of certain lands "between Babu Laldhari Singh of Bharathpura . . . and Babu Sukdeo Narain Singh . . . through their respective tenants." In the report an information of the duffudar of the circle is referred to to the effect that "the servants and tenants of Babu Laldhari Singh are bent upon creating a disturbance and forcibly cultivating the lands of mouza Kasra, regarding which disputes have been going on between the Babu of Bharathpur and the Babu of Narga, the paddy and rabi crops whereof were threshed and sold and the sale proceeds of the grains have already been deposited in the Treasury. Babu Sukdeo Narain Singh of Narga will offer opposition to the same. Hence there is likelihood of a breach of the peace." It further appears in the report that "Hurbans Lal, the *karpardaz* (agent), Jodhon Singh, the amin, and Gopal Singh, the brahil (peon), at the instigation of Hurukh Singh, the tenant of Babu Laldhari Singh, now state that the said lands are the *jotes* of other tenants. It is, therefore, not improbable that they will create a disturbance at the time of ploughing the said lands." Further it appears in the report that the Sub-Inspector, who reported the matter, examined Sham Kuar Koeri and Budhun Dhobi, two of the parties on the side of the Babu of Bharathpur and that they stated that the disputed lands are their *jotes* and also the *jotes* of Hurukh Singh, Bhugulu Teli, Bhabichan Kuhaur, Prayag Singh and Roghu Rai Kandur. It is further stated in the report that "at the instigation of Hurukh Singh, Jodhun Singh, Prayag Singh, Gopal Singh and Hurbans Lal, the servants and tenants of Babu Laldhari Singh, they (*i.e.*, the Babu of Narga and the Babu of Bharathpura) have now raised these disputes" and finally the Sub-Inspector states as follows:—

"Under these circumstances I fully believe that both the parties will create a disturbance at he time of cultivating the said disputed lands or offering opposition the cultivation thereof on behalf of any party. Hence I submit this report.'

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From this report it appears to me to be reasonably clear that the dispute which was reported to be likely to lead to a breach [901] of the peace was one concerning the actual possession of and the right to cultivate the lands.

Upon receipt of this report the Sub-Divisional Magistrate issued an order on the 22nd of July 1899, under s. 145, Code of Criminal Procedure, calling upon Laldhari Singh and Sukdeo Narain Singh to appear before him. This order contains the recital that "it appears from the report of the police that there is a dispute as to the actual possession of about 42 bighas 6 cottahs 7½ dhurs of land comprised in various plots, etc.," between Babu Laldhari Singh and Babu Sukdeo Narain Singh "through their respective tenants." Upon this report alone the order of the Magistrate purports to be based. Written statements were filed by both parties and the case was taken up on the 12th of August 1899. In their written statement the first party put forward the objection that the case could not proceed, unless the tenants mentioned in the report of the police and the other proprietors were made parties, as being parties concerned in the dispute. The Joint Magistrate evidently saw the force of this objection, for he immediately proceeded to amend the proceedings, being of opinion, as he says, that "the proceedings should be slightly altered first by the inclusion of the names of the three other brothers in the first party and secondly by changing "actual possession of" to "collection of rents in" and "that Prayag Narain Singh's name should be included in the second party." Accordingly an order was drawn up and passed, which is entitled "revised proceeding" by which after reciting that it appeared that there is a dispute between the parties named in the original order and the added parties "regarding the collection of rents in about 12 bighas 6 cottahs and 7½ dhurs of land in mauza Kasra," etc., the several parties were required to appear and file written statements of their "respective claims as regards the facts of actual possession of the subject of dispute."

The first party on the same day filed a written statement in which the objection as to parties previously raised was repeated and the further objection was taken "that there is no dispute about the collection of the rent" of the land, the subject of dispute. The dispute originally reported to exist, it is to be observed was a dispute as to the actual possession of certain [902] lands between Laldhari Singh and Sukdeo Narain Singh through their respective tenants," the dispute being that the tenants of the second party claim to be entitled to the possession of the land as tenants of the second party, while a different set of persons claim to be entitled to possession as tenants of the first party. The Sub-Divisional Magistrate overruled the objection of the first party and in the absence of the tenants of either party as parties to the proceedings heard the evidence adduced by the first and second parties and decided that the disputed land was in the *takhat* and the possession of the second party.

Mr. *Hill* on behalf of the first party, who now seeks to have the order of the Sub-Divisional Magistrate set aside, has contended that the order is bad in law and made without jurisdiction, inasmuch as the two sets of tenants who respectively claimed to be tenants of the land in dispute were parties concerned in the dispute, and as such, were necessary parties to the proceedings. This objection had been taken before the Magistrate at the earliest opportunity. I am of opinion that the contention is well founded. It is to be observed that the dispute in this case was not a dispute between the rival zemindars as to the right to collect the rents from tenants who were admittedly in undisputed occupation of the

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land, but it was a dispute as to the ownership of the lands between certain zemindars and their tenants on the one side and other zemindars and their tenants on the other. The real matter for determination was not merely which of the two parties of zemindars was entitled to collect the rents of the lands, but also which set of rival tenants was entitled to hold actual possession of the land. It was a dispute of a dual character. The fact that the crops of the land had been threshed and sold and the proceeds lodged in the Treasury support the view that the actual possession of the lands was a matter in dispute. Section 145, Code of Criminal Procedure, provides that the Magistrate when he is satisfied that a dispute likely to lead to a breach of the peace exists "shall make an order in writing stating the grounds of his being so satisfied and requiring the *parties concerned in such dispute* to attend his court . . . . . and to put in written statement of their respective claims as regards the *fact of actual possession* of the subject of [903] dispute. It is the fact of actual possession which the Magistrate is to determine under the section, and it is only when he has satisfied himself without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, that any of the parties was at the date of the order in such (*i. e.*, actual) possession that he can properly pass an order under the section declaring such party to be entitled to possession. The Magistrate in this case was made aware by the police report that two sets of rival tenants claimed to be in actual possession of the lands in dispute.

Prior to the alteration of the law by the present Code it was laid down that questions between rival zemindars as to the right of collecting rent directly from the ryots might be considered by the Magistrate under s. 530 of Act X of 1872, the section which corresponds with s. 145 of the present Code, *Empress* v. *Thacoor Dyal Sing* (1). Now by s. 145, Code of Criminal Procedure, sub-s. (2), land is expressed to include the rents and profits of lands, and it may, I think, be accepted as settled law that a dispute as to the right to collect rents is a dispute concerning land within the meaning of s. 145, Code of Criminal Procedure: *Pramatha Bhusana Deb Roy* v. *Doorga Churn Bhattacharji* (2), *Abhayessari Debi* v. *Sidhessari Debi* (3). In these cases which I have quoted the disputed possession consisted of receipts of rents from tenants in actual or present possession. There was no dispute between rival tenants as to the right to the present possession of the lands; as there is in the case before the Court. It appears to me, however, that, if a zemindar is called upon to establish a claim to actual possession by receipt of rent, he must satisfy the Court by proper evidence that the tenants by virtue of whose possession he constructively holds possession were at the date of the order in actual or present possession of the constituent portions of the land in dispute, and that it is not sufficient for him to establish to the satisfaction of the Magistrate a good paper title to a proprietary interest in the lands; he must go further and show [904] by receipt of rent or otherwise that he is in actual possession through persons actually occupying the land as his tenants. If he does not show this, the Magistrate cannot determine the fact of actual possession, which, it is his duty, to determine under s. 145, if he is able to do so. In the case of *Ram Chandra Das* v. *Monohur Roy* (4) TREVELYAN and RAMPINI, JJ. considered that the words in s. 145 " parties concerned " in a

(1) 3 C. 320. (2) 11 C. 413. (3) 16 C. 513. (4) 21 C. 29.

dispute do not necessarily mean only the parties who are disputing, but includes also persons who are interested in or claiming a right to the property in dispute. They state in their judgment as follows :— 1900 MAY 14.

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"We think the construction that the words 'parties concerned' in s. 145 included persons who are interested in or claiming a right to the property is the reasonable construction, and that it is the duty of the Magistrate on the materials before him to ascertain, so far as he can, who are the persons interested in or claiming a right to the property in dispute, and to give notice to them all so that the whole matter, so far as his Court is concerned, may be disposed of in one proceeding." This view commends itself to me as conveying the true interpretation of the section. It is supported by the language of the judgment of a Full Bench of this Court in the case of *Protab Narain Singh* v. *Rajendra Narain Singh* (1), wherein it is stated as follows :—" The Magistrate's duty before he initiates proceedings is not only to be satisfied that a dispute exists, but to ascertain as far as possible who are 'concerned in the dispute,' (an expression the meaning of which it is not necessary for us in the view which we take of the facts to determine in this case), so that they may be required to attend and the question of possession may be as far as possible settled."

The Magistrate has not in the present case followed the course of procedure so laid down ; on the contrary he has refused or neglected to make the tenants who were unquestionably disputing about the lands, parties to the proceedings ; and in so doing he has ignored the provisions of the section, which required him to summon before him some of the parties who were concerned in **[905]** the dispute. This is a matter which seems to me to lie at the root of the jurisdiction under the section.

The mischief of the course which the Magistrate adopted is apparent from a perusal of his judgment. Instead of relying upon evidence of facts going to establish actual possession such as receipt and payment of rent, cultivation of the lands, *pattas*, *kabuliats*, etc., he relies upon a *butwara* or partition of the property made so long ago as the year 1870. He investigates the paper title of the second party and from inferences which he draws from this paper title he determines the question of actual possession ; not merely does he do so, but he ignores as being fraudulent and collusive, certain orders of the Civil Court which were obtained by the first party and under which distraints had been levied against their tenants for the rent of the lands in dispute.

Assuming that the *butwara* proceedings taken in the year 1870 were favourable to the contention of the second party and showed that the second party was entitled to the lands at the time of these proceedings, it may well be that by mere assignment or by adverse possession the first party and their tenants have since acquired a good title as against the second party. There may, for example, have been an encroachment by the tenants of the first party on the land of the second party which has been submitted to by the second party for a sufficient length of time to give a title by prescription to the encroaching tenants. Such an encroachment on the part of the tenants would enure for the benefit of their landlords. In such a case there would be no document to support the title so acquired.

It is stated by the first party that their tenants paid rent in arrear for the land in dispute under pressure of the distraints issued by the Civil Court. This payment, if made, is a significant fact. It is alleged, and no

(1) 24 C. 55 (60).

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doubt may be the case, that the distraint proceedings were collusively carried on between the first party and their tenants with the improper object of fabricating evidence which would lend colour to a claim to the lands, and in this connection, it is to be observed, that in the Civil Court objections were raised to the proceedings by ryots who denied the title to the land of the tenants of the first party, and that these objections were overruled on the ground that the ryots so [906] objecting had no *locus standi* in the civil proceedings. However this may be, it appears to me, that the Magistrate overstretched the limits of his jurisdiction when he declared that these proceedings were collusive in the absence of the tenants of the first party, who were reported to him to be parties concerned in the dispute, and whom he refused to summon to his Court on the ground that they had no concern in it.

It appears to me that the amendment made by the Magistrate in the proceedings, was made with the object of overcoming the objection as to parties which had been raised by the first party, and judging by the police report not improperly raised and that the action of the Magistrate in this respect was based upon a misconception of the meaning and requirements of the law. It was, I think, under the circumstances of this case, no answer to the objection to state, as the Magistrate has done, that "the tenants cannot be concerned in or parties to collection of rent which is a right only of the zemindars." The duty of the Magistrate was to deal with the dispute as it really was, namely, a dispute between one set of zemindars and their tenants on the one side and another set of zemindars and their tenants on the other, and accordingly to maintain in possession according to their respective interests the zemindars and their tenants, whom he found on satisfactory evidence to have been in actual possession, at the date of the order, if the evidence satisfied him that any of the parties to the dispute was in such possession, and if he was unable to satisfy himself as to this then to have recourse to the provisions of s. 146 of the Code of Criminal Procedure, and, if necessary, bind over the parties to keep the peace. In the case *Harak Narain Singh* v. *Luchmi Bux Roy* (1) in dealing with a case under s. 340 of Act X of 1872 JACKSON, J., says as follows: "It seems to me clear that when a zemindar has let his lands or a portion of them in farm, he, his farmers, and the occupancy ryots are all in their degree concerned in any dispute as to possession which may arise, and that they may and ought to be respectively maintained in possession of the interests which they severally enjoy." The learned Advocate-General seeing the force of objection as to parties, endeavoured to meet [907] it by this argument. He says in substance, as I understand his argument, that, admitting that the objection would be valid in the case of a dispute between real rival tenants and their zemindars on the one side and other tenants and their zemindars on the other; in the present case the so-called tenants of the first party are not tenants at all, but mere dummies, persons who are collusively put forward by the first party for the purpose of defeating the rights of the rival zemindars. This argument appears to me to beg the question. The dispute was between rival tenants as well as their respective zemindars as appears from the police report upon which and upon which alone the proceedings were based, and it was not for the Magistrate, I think, to close his eyes to this fact and turn the dispute from being a dispute as

(1) 5 C.L.R. 287.

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to possession into a dispute as to the receipt of rent. In this respect, in my opinion, he exceeded his powers.

That the order is calculated to operate to the prejudice of the first party and their tenants, appears to me to follow from the fact that all disturbance of possession of the second party is prohibited by this order. In the case of *Goluck Chandra Pal* v. *Kali Charan De* (1) my brothers PRINSEP and GRANT, JJ. laid it down that the servants of a party to proceedings under s. 145, Criminal Procedure Code, who were not parties to a proceeding under that section, were nevertheless liable to prosecution under s. 88 of the Penal Code for disobedience to the order of a public servant for disturbing the possession of the party in whose favour an order of the Magistrate was passed under s. 145, Criminal Procedure Code. The persons who claim to be tenants of the first party are either mere servants or tools in the hands of the first party or else they are tenants of the first party. Admittedly they are not tenants of the second party. If they are servants of the first party they would, upon the authority of the case to which I have referred, be liable to prosecution under the Penal Code, if they disturbed the possession purported to be given by the Magistrate's order. If on the other hand, they are tenants of the first party and as such entitled to the possession of the land in dispute, they would incur serious risk of prosecution if, in the face of the **[908]** order, they should persist in maintaining this claim to possession of the land. The first party also would, I apprehend, be precluded by the order of the Magistrate from accepting rent from them as tenants, inasmuch as the so doing would amount to a disturbance of the possession of the rents and profits of the land, and so a contravention of the order. The tenants cannot therefore discharge their liability to pay their rent, if tenants they are.

The way, I may observe, in which the learned Magistrate has in his judgment dealt with the question of possession, seems to me to be somewhat remarkable. From this judgment it would seem that he regarded the question of title as the question for his determination rather than the question of possession. He says that a mass of village papers has been filed on each side (what these are we are not told) and then proceeds to say: "setting off the village papers of one side against those filed by the other and regarding them of nearly the same value, I proceed to discuss the distraint and the *batwara* papers and their weight on the question of possession." A remarkable process in the determination of the question before him is adopted in regard to the village papers, whatever these papers may have been, and the Magistrate forthwith proceeds to deal with the distraint proceedings and the *batwara* papers. The order of the Civil Court and the distraint consequent therein he has no hesitation in treating as void, and he declares the conduct of the tenants of the first party to have been fraudulent and collusive, although he has previously refused to make them parties to the proceeding and no opportunity was afforded them of refuting this charge. The distraint proceedings being thus disposed of, the Magistate next deals with the *batwara* proceedings which were determined in the year 1870. The partition then effected, no doubt, affords useful evidence of title at that date, but I fail to see that much importance can be attached to it in determining the question of actual possession in the year 1899. If this evidence had been supplemented by evidence of receipt of rent, the granting of *kabulyats*, the

(1) 13 C. 175.

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occupation and cultivation of the lands by the tenants of the party deriving under the partition, it would be otherwise. Here, however, the Magistrate in his judgment relies on no such evidence, but attaches weight and importance, to the *batwara* proceedings and comes to [909] the conclusion on the whole that the evidence of possession appears to be "more satisfactory and convincing for the second party" and decides accordingly.

The effect of the order as I have said appears to me to be prejudicial to the tenants of the first party, although they were not parties to the proceedings, for it is a judicial determination binding on their landlords, if not on them, that the second party were at the date of the order in actual possession of the lands through their tenants and that the tenants of the first party had no such possession.

It appears to me, moreover, that the first party were also prejudiced in not having their tenants associated with them in the proceedings as responsible litigants.

No doubt it was open to these tenants to come forward and give evidence in support of the case of their zemindars, but it might well be, seeing that they were not made parties to the proceedings, that they would not over-exert themselves, if they did not elect to remain mere spectators of the dispute.

For the foregoing reasons I am of opinion that the proceedings of the Magistrate were misconceived, and that the order passed by him is bad in law for failure on his part to comply with the requirements of s. 145. I would, therefore, set aside this order and direct that any costs which may have been paid under it shall be refunded.

Upon the second contention, which has been pressed by Mr. Hill, namely, the objection as to the adding of parties by the Magistrate after the proceedings had been instituted, I think that the so-called "revised proceeding" may properly be regarded as an entirely new proceeding. The original proceedings were revised with the object of overcoming the objections raised in the written statement of the first party, and the amended proceedings were to my mind intended to be a new proceeding. If they be so regarded, there appears to me no substance in the objection as to adding of parties. At the same time there was nothing in my opinion to justify the revision which was made by the Magistrate. The amendment was obviously made to meet the valid objection of the first party and was not justified by the [910] circumstances which were brought to the notice of the Magistrate by the police report. It was, I think, an abuse of jurisdiction on his part so to alter the proceedings, and an abuse which would justify the intervention of the High Court under the powers conferred by the Charter.

Owing to the above difference of opinion the case was referred under s. 429 of the Code of Criminal Procedure to Mr. Justice Ameer Ali.

Mr. *Jackson* (with him *Moulvie Syed Shamsul Huda*), for the petitioners cited *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (1), *Empress* v. *Protap Chandra Ghose* (2), *Charoobala Dabee* v. *Empress* (3), *Opoorba Kumar Sett* v. *Sreemutty Brajangana Dassee* (4) and *Nemai Chand Kundu* v. *Nibaran Chandra Dheriah* (5).

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(1) 26 C. 188. (2) 25 C. 852. (3) 3 C. W. N. 601.
(4) 1 C.W.N. 49. (5) 4 C. W. N. Short notes clix.

Mr. *C. Gregory* (with him *Moulvie Mahomed Ishfaq*), for the opposite party. 1900 MAY 14.

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1900, MAY 14. The following judgment was delivered by

AMEER ALI, J.—This case has been referred to me by the Honorable the Chief Justice in consequence of a difference of opinion between the learned Judges presiding over the Criminal Bench at the time it was heard. 27 C 892= 4 C.W.N. 613.

The facts which have given rise to these proceedings are sufficiently set out in the judgment of the Sub-Divisional Magistrate of Jahanabad, and it is not necessary therefore, to state them in detail. It is enough to refer only to the salient facts for the proper understanding of the questions involved in the case.

It appears that upon a *butwara* or partition made some thirty years ago, one portion of Mouza Koushra in the Sub-Division of Jahanabad fell to the share of Laldhari Singh and his minor brothers commonly called the Bharathpura Babus, who in these proceedings are designated the first party, whilst [911] the other portion fell to the share of a relative of theirs whose interest has been recently purchased by Sukhdeo Narain Sing and his co-sharers commonly known as the Narga Babus and who in these proceedings are called the second party. Between these two *tukhtas* or plots there lies a strip of land consisting of over 42 bighas in area, which forms the subject matter of the present dispute. On the 13th of July 1899 the Sub-Inspector of Arwal submitted a report to the Sub-Divisional officer, the purport of which is set out in the judgment of Mr. Justice Stanley. But as the case practically turns upon that document it is desirable I should refer here to some of the important passages. The report begins thus:—"I beg to state that this day when I was returning from Kurthu, Raghu Nath Upadhya, the *duffadar* of this circle, met me at Mouzah Kushra, where he submitted to me an application signed by himself and containing information to the effect as follow: "The servant and *tenants* of Babu Laldhari Singh of Bharathpura are bent upon creating a disturbance and forcibly cultivating the lands of Mouza Kushra regarding which disputes have been going on between the Babu of Bharathpura and the Babu of Narga, the paddy and *rabi* crops whereof were threshed and sold, and the sale proceeds of the grains have already been deposited in the Treasury. Babu Sukdeo Narain Singh of Narga will offer opposition to the same. Hence there is a likelihood of a breach of the peace. I therefore give information." After stating that he had sent for a number of tenants and questioned them on the matter the Sub-Inspector records his conclusion that the lands are the *jotes* of the other tenants, and then he proceeds as follows: "It is therefore not improbable that they will create a disturbance at the time of ploughing the said lands." He goes on to say: "Although I sent for the people on the side of the Babu of Bharathpura, yet, except Sham Unar Koeri, and Bhudan Dhobi, no other man on behalf of the said Babu appeared before me from Kushra. Upon asking them they stated that the disputed lands are their *jotes* and also the *jotes* of Harakh Singh and others," and so on. He states further that it appeared to him from his enquiries that the tenants of the second party had since a long time been in possession of these lands; and he adds that "at the instigation [912] of Harakh Singh, Judhan Singh, Prayag Singh, Gopal Singh and Hurbanslal, the servants and tenants of Babu Laldhari Singh" (meaning

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the first party) "they have now raised these disputes" and he winds up his reports as follows: "Under these circumstances I fully believe that both parties will create a disturbance as the time of cultivating the said disputed lands or offer opposition to the cultivation thereof on behalf of some party." Upon this report the Sub-Divisional Officer of Jahanabad recorded an order on the 22nd of July in the following terms: "Whereas it appears from the report of the police that there is a dispute as to the actual possession of about 42 bighas 6 cottahs 7½ dhurs of land comprised in various plots * * * between Babu Laldhari Singh of Bharathpura * * * and Baboo Sukdeo Narain Singh of Narga * * * through their respective tenants; and whereas from the above report and the nature of the dispute I am satisfied that the dispute is likely to lead to a breach of the peace, I hereby call upon the aforesaid parties to appear before me in person or by pleader on the 4th August 1899 and file written statements of their respective claims as to the fact of actual possession of the said land in dispute." The then first party, namely, the Bharathpura Babu, Laldhari Singh, filed his written statement on the 12th of August; in which, among other objections, he urged that the proceedings were bad, inasmuch as the tenants mentioned in the report of the police were not made parties. The Magistrate, who had recorded the proceeding of the 22nd of July, was in the meanwhile succeeded by another officer, and he apparently upon the written statement filed by the first party and in order to meet Laldhari Singh's objection "revised," as he calls it, his predecessor's proceeding, and drew up the one upon which the present order is based. This so-called revised proceeding, which bears date the 12th of August, runs thus: "Whereas from the report of the Sub-Inspector of *thana* Arwal, dated 13th July 1899, it appears that there is a dispute between the undermentioned persons regarding the collection of rents in about 12 bighas, 6 cottahs, 7½ dhurs of land in Mouzah Kusha *thana* Arwal as specified below, and that this dispute, I am satisfied from the said report, is likely to cause a breach of the peace. I hereby, under s. 145 of the Code of Criminal Procedure, call upon [913] the aforesaid persons to appear before me in person or by pleader, on the 23rd day of August 1899 and to file written statements of their respective claims as regards the fact of actual possession of the subject of dispute." By this revision the Sub-Divisional Magistrate altered the entire character of the proceeding; he converted the dispute, which was originally stated to be a dispute regarding the actual possession of the land, into a dispute regarding the collection of rents between the persons named therein. Although no doubt, at the end of the proceeding, he calls upon the parties "to file written statements of their respective claims as regards the facts of actual possession of the subject of dispute," it does not alter the new complexion he gave to the dispute. At the same time he introduced into the proceeding on the side of the first party the minor brothers of Laldhari Singh and a person named Prayag on the other. There is nothing to show that beyond being co-sharers of Laldhari these minors were at all concerned in the dispute. But it is said that they were made parties at the instance of Laldhari and that he is their guardian. What that has to do with the case it is difficult to imagine; they certainly did not apply to be made parties. However that may be, the tenants of the first party who, it was clear from the police report, claimed to be in actual occupation of land, were not made parties. Thereupon a fresh written statement was filed on behalf of the Bharathpura Babus, in which the same objections were substantially repeated. The Sub-Divisional Officer overruled the objection; and holding that the distraint proceedings

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which Laldhari had taken against his tenants in respect of this very land and upon which he naturally relied in support of his claim to be in actual possession thereof through them were collusive and fraudulent, he came to the conclusion upon the evidence before him that the second party was in possession of the strip of land in dispute, and he accordingly made an order in his favour under s. 145 of the Criminal Procedure Code. The first party then applied for and obtained from this Court a rule calling upon the Sub-Divisional Magistrate to show cause why his order declaring the second party to be in possession should not be set aside. The rule was asked for on several grounds, but was granted in a general form. It was accordingly open to the Court to go into the whole case. The principal objection taken to the order of the **[914]** Sub-Divisional Magistrate was that the lower Court had acted illegally in not making the tenants parties to the proceeding and in altering its form as already mentioned on the 12th of August. The case came before Mr. Justice Prinsep and Mr. Justice Stanley. Mr. Justice Prinsep was of opinion that although it would have been better, if the tenants had been joined, still, as the omission to make them parties does not affect the jurisdiction of the Court, the High Court could not interfere with the order of the Magistrate. Mr. Justice Stanley, on the other hand, was of opinion that the omission goes to the root of the case and is an illegality, which would justify the High Court in setting aside the order. I have given just the bare essence of the two views.

Looking to the report of the Sub-Inspector which forms the basis of the case, it seems to me clear that the Sub-Divisional Magistrate in recording the revised proceeding either misapprehended the nature of the dispute between the parties or he was anxious to take a short cut to avoid introducing a number of parties into the case. This was not a case of a dispute between two rival sets of zemindars contending amongst themselves as to who was in receipt of rent from one common set of tenants. Had that been the case it would have been a dispute regarding the collection of rents. From the police report, however, it is perfectly clear that two rival sets of tenants claiming to hold under two rival sets of zemindars were disputing as to the actual occupation or possession of this strip of land. The two sets of zemindars could not be said to be in *actual* possession, except by receipt of rent through their tenants, but the persons actually in possession or claiming to be actually in possession were the tenants, who, as the report beyond question shows, were disputing and from whose attitude a breach of the peace was apprehended at the time of cultivation. For the purpose of considering how far the procedure adopted in this case is legal or regular, we may assume that the Bharathpura Babus were in receipt of rent from the persons who alleged to be their tenants, and we may assume that they received rent from them in respect of this very land. Similarly it may be assumed that the Narga Babus were in receipt of rent from their tenants and perhaps in respect of this very land. But the question which required determination was which set of tenants was in actual occupation of this land. **[915]** The Sub-Divisional Magistrate chose, apparently upon the objection of the first party, to alter, the proceeding not merely in form but in substance, as a slight examination of the facts would show. As I have stated before, had two rival sets of zemindars been disputing about the collection of rents from the same set of tenants, the revised proceedings would have been perfectly regular and in accordance with law, for the dispute in that case would have, in reality, related to the question which set of zemindars was entitled to collect the rent from the tenants whom

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both sets recognized to be in occupation of their holding. But here two rival sets of tenants holding under two different sets of zemindars were contending about the actual possession of a strip of land. There was no question as to the collection of rent at all. The dispute, pure and simple, was which set of tenants was in actual occupation of the land. The tenants thus were the parties directly *concerned in the dispute.* If the tenants of the first party were in possession then the latter were in possession through them (to use the Sub-Inspector's language). If the tenants of the Narga Babus were in possession, then these zemindars were in possession through them. It will be seen, therefore, that whereas the tenants were directly concerned in the dispute the zemindars' concern was of an indirect character. The presence of the tenants was thus essentially necessary for the proper and effectual decision of the case. Section 145 of the Criminal Procedure Code requires that "whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police report that a dispute likely to cause a breach of the peace exists * * * * * * he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court * * * and to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute." The meaning of the expression "parties concerned" has been discussed in several recent cases. I need only refer to *Protap Narain Singh* v. *Rajendra Narain Singh* (1) and *Ram Chandra Das* v. *Monohur Roy* (2). I desire to express my entire concurrence with the [916] views therein expressed. In the present case, however, it does not seem to me to require any positive authority or any long process of reasoning to come to the conclusion that the persons who were directly and essentially concerned in the dispute were the tenants, who respectively asserted actual possession of this land. It is possible that the tenants of the first party were mere dummies or were not really in possession, but that question could only be determined in their presence. A short consideration of the consequences likely to follow from the fact of their not having been made parties would show, in my opinion, that their omission is a matter which goes to the root of the case. In the first place, if the tenants of the first party are actually in possession and, if the present order, as Mr. Gregory for the second party stated, does not affect them, and they can still hold possession in spite of that order, in that case the whole proceeding is absolutely worthless. If the effect of the order, however, be that, although not made parties, the tenants of Laldhari are affected by it, in that case a determination most prejudicial to them has been arrived at without their being present or being heard. It is futile, in my opinion, to say that, as their landlords were present, they have not been prejudiced or that they could have come in, if they had chosen. It is hardly likely that raiyats would force themselves into a proceeding of this nature of their own free will, unless called upon by the Court.

Again, if they are not liable to prosecution upon this order for going upon the land, the first party zemindars would not be in a position to prevent their so doing, and yet would be liable to prosecution in case any attempt is made by their servants, or tenants to disturb the possession given to the second party. Again an order having been made under s. 145, to get rid of its effect the first party will have to go into the Civil Court; but the tenants of the second party not being parties to the

(1) 24 C. 55. (2) 21 C. 29.

proceeding, they (the first party) would find considerable difficulty in joining them as defendants in a civil suit, for they have no cause of action against them. The cause of action in a suit of that character being based on the order under s. 145.

As regards the position of the tenants in this case it may be useful to refer to the language of the learned Judges who decided [917] *Janoki Nath Ray* v. *The Queen-Empress* (1), where they say emphatically "in the next place the Magistrate should be aware that one of the first principles on which our Courts proceed is that judicial proceedings cannot bind a person who is not a party to them." Thus the omission of the tenants from the present proceeding would necessitate a fresh and separate proceeding against them, a procedure not only harassing, but to my mind, unwarranted by law. In my opinion the section contemplates one proceeding against all the parties *known to be concerned* in the dispute so as to conclude the matter definitely and finally so far as the Criminal Courts were concerned. If the Sub-Divisional Magistrate had considered how an order of this kind would work, he would have seen himself that the revised proceeding which he recorded was one which could not possibly be carried out. When a Magistrate is expressly enjoined, as he is by s. 145, to require *the parties concerned in the dispute* to come in and assert their claims, it is his duty to call upon all of them to do so, and he cannot make a selection as the Sub-Divisional Magistrate in this case has chosen to do. The question of leaving out parties or instituting proceedings against wrong parties is, in my opinion, not a mere irregularity, but a question affecting jurisdiction; the Sub-Divisional Magistrate having altered the nature and character of the dispute by his order of the 12th of August and having omitted to include in the proceedings the tenants who were directly concerned in the dispute and without whose presence the dispute could not be satisfactorily settled, I think his order is illegal and without jurisdiction.

I agree with Mr. Justice Stanley in thinking that the order recorded by the Sub-Divisional Magistrate on the 12th of August was an abuse of jurisdiction, inasmuch as the report on which it rested did not give any information as to any dispute regarding the collection of rent, but had reference to the actual possession of a piece of land by two rival sets of tenants claiming to hold under two rival sets of zemindars.

That being so, the case falls clearly within the enunciation of the law as set forth in the judgment in *Hurbullubh Narain Singh* [918] v. *Luchmeswar Prosad Singh* (2), and I think this Court has the power to interfere both under its revisional jurisdiction as also under cl. 15 of the Charter. For these reasons I am of opinion that the whole proceeding is bad and ought to be set aside. If there is still any apprehension of a breach of the peace the Magistrate can take any step in accordance with law which he may consider necessary for the purpose of preventing any occurrence of that kind.

I accordingly make the rule absolute and set aside the order of the Sub-Divisional Magistrate of Jahanabad, dated the 29th of December 1899, declaring the second party to be entitled to the possession of the disputed land, until evicted therefrom in due course of law. I also direct that the costs, if paid, be refunded.

Rule made absolute.

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(1) 3 C.W.N. 329.

(2) 26 C. 188.

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Before Mr. Justice Prinsep, and Mr. Justice Handley.

DAIMULLA TALUKDAR (*Petitioner*) *v.* MAHARULLA TALUKDAR (*Opposite Party*).* [1st May, 1900.]

Jurisdiction—Dispute regarding right to property—Power of Magistrate to determine rights and shares of parties—Civil Court—Code of Criminal Procedure (Act V of 1898), *ss.* 144 *and* 145.

It is not because private parties or members of the same family dispute regarding their respective rights to land or crops, that a Magistrate is called upon to interfere. A Magistrate cannot take upon himself to decide questions of fact and Mahomedan law, so as to satisfy himself as to what are the actual rights of the parties to the lands in dispute. If he has good reasons to believe that such a dispute is likely to cause a breach of the peace, the law enables him to ascertain and maintain actual possession, or if it is shewn that the members of the family are inclined to break the peace he can bind them all over to keep the peace.

Where there was a dispute between the parties, who were related to one another, as to the amount of their shares to certain property which was claimed on the one hand to be joint in certain shares, and on the other hand to exclusively belong to the other party, and no proceedings had been taken under s. 145 of the Code of Criminal Procedure, nor was there [919] anything to show that there was any probability of a breach of the peace, the Magistrate passed the following order: "The applicants must not plough more than 12 annas of the land." *Held*, that such an order could not properly fall within s. 144 of the Code of Criminal Procedure, as an order under that section could only be passed on some emergency and would have effect for only two months. The present order in its operation would have effect and was intended to have effect, until the parties went to a Civil Court to settle their disputes, and no emergency was even suggested. That the order, therefore, was entirely without any authority of law and must be set aside.

IN this case certain parties, who were related to one another, were quarrelling regarding their rights to certain property, which was claimed on the one hand to be joint in certain shares, and on the other hand to exclusively belong to the other party. There were no proceedings taken under s. 145 of the Code of Criminal Procedure in order to ascertain the actual possession of the land, nor was there anything to show that there was any probability of a breach of the peace.

The Sub-Divisional Magistrate made certain inquiries, and having taken upon himself to decide questions of fact and questions of Mahomedan law, so as to satisfy himself as to what were the actual rights of the parties to the lands in dispute, passed the following order: "The applicant must not plough more than 12 annas of the land."

Babu *Mohini Mohun Chuckerbutty*, for the petitioner.

Babu *Atulya Charan Bose*, for the opposite party.

JUDGMENT.

1900, MAY 1. The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—There was a dispute between the parties who were related to one another, and on this, after having made certain inquiries, the Sub-Divisional Magistrate passed the following order: "The

* Criminal Revision No. 182 of 1900, against the order passed by J. Johnstone, Sub-Divisional Officer of Serajgunj, dated 27th January 1900.

applicant must not plough more than 12 annas of the land." In coming to this conclusion, as we learn from the Sub-Divisional Magistrate's explanation, he has taken upon himself to decide questions of fact and questions of Mahomedan law, or in other words to exercise the functions of a Civil Court, so as to satisfy himself as to what are the actual rights of the parties to the lands in dispute. There were no proceedings [920] taken under s. 145 in order to ascertain the actual possession of the land, nor, we may observe, is there anything to show that there was any probability of a breach of the peace. The proceedings before us, so far as they go, show that the parties are quarrelling regarding their rights to certain property which is claimed on one hand, to be joint in certain shares, and on the other hand to exclusively belong to the other party. It is contended before us by the learned pleader, who appears against the rule, that the order is one within s. 144 of the Code of Criminal Procedure, inasmuch as it directs certain persons to abstain from an act, that is, from ploughing more than 12 annas share of certain lands. In our opinion, however, it cannot properly fall within that section, for an order under s. 144 can only be passed on some emergency, and it has effect for only two months. The present order in its operation will have effect and was intended to have effect, until the parties went to the Civil Court to settle their disputes, and no emergency is even suggested. The order therefore is entirely without any authority of law. and must be set aside.

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27 C. 918.

The Magistrate, we observe, represents that he is in a difficulty how to deal with such a matter and he states: "If I had only consulted my own convenience, I should without hesitation have allowed the parties to fight on as the consequent cases of rioting or murder would have required far less expenditure of time and trouble than has been necessary for the purpose of preventing it. In case my order is set aside, I hope the Hon'ble Judges will be so good as to suggest what could have been the proper procedure, as the Criminal law does not, to my mind, provide any clear rule on the subject of what is to be done, when a dispute as to the amount of their shares breaks out between the sharers in what had been joint property, and the case is one which to judge from my short experience arises pretty frequently."

In dealing with this matter, as he has done, we give the Magistrate full credit for a desire to do his duty, and, if possible, to end this dispute which might lead to further trouble. But the Magistrate has exceeded his powers and he has interfered in a manner which was quite unnecessary. It is not because private parties or members of the same family dispute regarding their [921] respective rights to land or crops, that the Magistrate is called upon to interfere. If he has good reason to believe that such a dispute is likely to cause a breach of the peace, the law enables him to ascertain and maintain actual possession. But that is not the case here. The Magistrate did not take proceedings under s. 145; and even if the Magistrate had taken such proceedings he was not competent to do more than to determine actual possession. He could not, as he has done, determine rights of parties under Mahomedan law. Such questions should be left to the Civil Courts. We would also point out that the proper course for a Magistrate to take when it is shown that members of the same family are inclined to break the peace is to bind them all over to keep the peace. The law, therefore, gives the Magistrate ample powers in respect of a dispute such as the present. In this case, the Magistrate has failed to exercise such jurisdiction, and he has acted in a manner altogether beyond his powers. His order must be set aside as without jurisdiction.

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MAY 11.

CRIMINAL REVISION.

27 C. 921.

27 C. 921.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

MAHADEO SINGH (*Petitioner*) *v.* QUEEN-EMPRESS (*Opposite party*).*
[11th May, 1900.]

False charge, prosecution for making—Necessity of examination of complainant—Dismissal of complaint—Order for judicial inquiry or report without examining complainant, legality of—Penal Code (Act XLV of 1860), *s.* 211—*Code of Criminal Procedure (Act V of* 1898), *ss.* 202, 203 *and* 476.

Where a Magistrate after having examined the complainant and without hearing his witnesses or dismissing the complaint ordered the complainant to be prosecuted under s. 211 of the Penal Code.

Held, that the Magistrate's order was without jurisdiction.

Where a complainant, whose complaint had been reported false by the police. complained to the Magistrate and asked him to try the complaint, and [922] the Magistrate did not examine the complainant himself, but made over the case to a Subordinate Magistrate for judicial inquiry or report.

Held that the Magistrate had no authority for this procedure.

A complainant must be examined by the Magistrate, who receives the complaint, or by some Magistrate to whom he has transferred the case. When a complainant has been examined he is entitled to have the person accused brought before the Magistrate, and it is only when the Magistrate has reason not to believe the truth of the complaint from his examination that this can properly be refused and an investigation held.

[F., 4 O.C. 127 (131); R., 33 C. 1=2 C.L.J. 228 (229)=10 C.W.N. 158; 12 Cr. L.J. 539=12 Ind. Cas. 515=2 P.R. 1912 Cr.=11 P.L.R. 1912; D., 6 C.W.N. 295 (297).]

IN this case the petitioner, on the 21st of April 1899, complained to the police in respect of the theft of certain documents. After investigation the police reported the complaint to be false. On the 30th of April the petitioner appeared before the District Magistrate and made a complaint asking to have the matter tried. The District Magistrate deferred passing orders until he was in receipt of the police report, and then, on the 6th of May, he ordered the petitioner to show cause within seven days why he should not be prosecuted under s. 211 of the Penal Code, and at the same time he made over the complaint of the petitioner to the Deputy Magistrate for judicial inquiries and report. The Deputy Magistrate, after examining the petitioner and his witnesses, reported to the District Magistrate that the complaint was in his opinion false. The District Magistrate on this passed an order under s. 476 of the Code of Criminal Procedure directing the petitioner to be prosecuted for an offence under s. 211 of the Penal Code. This matter was then considered on a rule granted by the High Court, and, inasmuch as the District Magistrate had ordered the petitioner to be prosecuted under s. 211 of the Penal Code for having made a false complaint without ever examining him, the order under s. 476 of the Code of Criminal Procedure was set aside. The District Magistrate then renewed the proceedings and examined the petitioner, and on that examination he again passed an order directing the petitioner to be prosecuted under s. 211 of the Penal Code.

Babu *Preo Nath Sen*, for the petitioner.

* Criminal Revision No. 271 of 1900, made against the order passed by G. Balthasar, Esq., Officiating Deputy Commissioner of Palamau, dated the 12th of March 1900.

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27 C. 921.

JUDGMENT.

1900, MAY 11. The judgment of the Court (PRINSEP AND HANDLEY, JJ.) was delivered by

PRINSEP, J.—After investigation, the police reported that the complaint of Mahadeo Singh, in respect of theft of certain [923] documents, was false. On the 30th of April Mahadeo Singh appeared before the District Magistrate and made a complaint asking to have the matter tried. The District Magistrate deferred passing orders on the matter, until he was in receipt of the police report, and then, on the 6th May, he ordered the complainant to show cause within seven days why he should not be prosecuted under s. 211 of the Indian Penal Code, and at the same time he made over the complaint of Mahadeo Singh to the Deputy Magistrate for judicial inquiry and report. On the 10th June, the Deputy Magistrate ordered notice to the complainant to appear before his Court with evidence on the 30th June, and after examining the complainant and his witnesses, he reported to the District Magistrate that the complaint was, in his opinion, false. The District Magistrate on this passed an order under s. 476 of the Code of Criminal Procedure directing the petitioner to be prosecuted for an offence under s. 211 of the Indian Penal Code. This matter was then considered on a rule granted by this Court, and, inasmuch as the District Magistrate had ordered the complainant, Mahadeo Singh, to be prosecuted under s. 211 of the Indian Penal Code for having made a false complaint without ever examining him, the order under s. 476 was set aside.

The Magistrate has renewed these proceedings and has examined the complainant, and on that examination he has again passed an order directing the complainant to be prosecuted under s. 211 of the Indian Penal Code.

A second rule, which is now before us, has been granted, and we have again considered this matter. It has been represented to us, and it would appear from the Magistrate's judgment, which was before us and which was not withheld from us, as the Magistrate in his explanation seems to think, that the Magistrate has proceeded entirely on the statement of the complainant. The Magistrate now represents in his explanation that he acted on the police report and also on the report of the Magistrate, who had held the judicial inquiry, and he further assures us that he had also considered the evidence recorded by that Magistrate before passing the order under s. 476 of the Code of Criminal Procedure.

The proceedings from first to last have been misconceived, and we think that this irregularity has operated very unfairly [924] towards the complainant. He protested against the police investigation and asked the District Magistrate to try his complaint. The District Magistrate did not himself examine him in accordance with law. He made over the case at once to a Subordinate Magistrate for judicial inquiry and report. He had no authority for this procedure. The law requires that a complainant shall be examined, and it also provides that, if the Magistrate, after examination of the complainant, has reason not to believe the truth of the complainant, he can order an inquiry or investigation to be held. That was not the course taken by the Magistrate in this case, nor did the Magistrate (as he ought to have done) transfer this case for trial by the Subordinate Magistrate. He retained it in his own Court for trial and he referred it, as we think without any authority, to a Subordinate Magistrate

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for an "intermediate judicial inquiry," as he terms it. The complainant was entitled to have his case tried out by some officer and to have final orders passed on it. The case before the District Magistrate has never been tried out and has never been dismissed on evidence recorded by him or obtained by him in the manner directed by s. 202. Whatever may be the merits of the case, we think that the proceedings, which have extended much more than one year, have been unduly prolonged, and that there is no necessity for continuing them. The Magistrate's order under s. 476 is, in our opinion, without jurisdiction, inasmuch as it has not been properl y passed on judicial proceedings before himself, and we think that the protest made by the complainant against the result of an investigation by the police should have received proper attention at the hands of the District Magistrate.

To avoid any misunderstanding we would point out that a complainant must be examined by the Magistrate who receives the complaint, or by some Magistrate to whom he has transferred the case. This was not done. When a complainant has been examined, he is entitled to have the person accused brought before the Magistrate, and it is only when the Magistrate has reason not to believe the truth of the complaint from his examination that this can properly be refused and an investigation held. Here the complainant protested against the police report and he appealed to the Magistrate for redress. It was certainly not fair to the complainant [925] to disbelieve his complaint without ever hearing him ; to order an investigation by another Magistrate and act on that investigation ; and, without hearing the complainant from first to last, to order him to be prosecuted for making a false complaint. That was how the matter stood on the order passed on the first rule. The situation has not been improved since. The complainant has, it is true, been examined, but his witnesses have not been heard by the District Magistrate, who has condemned him on a report made by another Magistrate after an inquiry held irregularly and without jurisdiction. The examination has, in point of fact, been only a compliance with our order on the rule, so as to enable the District Magistrate to repeat the order previously passed by him. Even now the complaint has not been dismissed, and it certainly has not received the judicial trial that the complainant asked for and was entitled to. There was really nothing before the District Magistrate on which he could properly pass an order under s. 476 of the Code of Criminal Procedure. The rule is, therefore, made absolute, and it is directed that no further proceedings be taken in this matter.

27 C. 925=4 C.W.N. 755.

1900 APRIL 2.

CRIMINAL REVISION.

27 C. 925= 4 C.W.N. 755.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stanley.

AKHOY KUMAR CHUCKERBUTTY (*Petitioner*) v. JAGAT CHUNDER CHUCKERBUTTY (*Opposite party*).*
[29th March and 2nd April, 1900.]

Accomplice—Wrongful confinement — Extortion — Money lent in ordinary course of business to pay amount extorted—Lender—Penal Code (*Act XLV of* 1860), *ss.* 213, 342 *and* 384.

The accused, a Sub-Inspector of Police, arrested one *J.*, wrongfully confined him, and extorted from him Rs. 200 under a threat that he, the accused, would not release *J.*, unless the money were paid. This money was paid on this account by *P.*, a money lender, who lent *J.* the money for this purpose. Accused was convicted under ss. 342 and 384 of the Penal Code. In appeal the Sessions Judge held that *P.* was not an accomplice, and having considered his evidence accordingly dismissed the appeal.

Held, that it was sufficiently shown that the money was not voluntarily given, that it was given by *J.* to obtain his release from police custody, in [926] which he was detained on no reasonable or sufficient ground, and it was extorted, because the Sub-Inspector refused to release *J.*, as he was bound to do, unless he were paid that money. That *P.* paying such money under such circumstances could not be regarded as an accomplice of the Sub-Inspector in such misconduct.

[**Appr.**, 33 C. 649 (653)=10 C.W.N. 669; **R.**, 12 Cr.L.J. 150=9 Ind. Cas. 897=21 M. L J. 283=10 M.L.T. 84=(1911) 2 M.W.N. 327.]

IN this case the accused, who was employed as Sub-Inspector of Mohigunj thana, arrested one *J.* on the charge of being concerned in the theft of a cart. *J.* was detained at the thana, and ultimately released on payment by him to the accused of the sum of Rs. 200 under a threat, that accused would not release *J.* unless the money were paid. This money was paid on this account by *P.*, a money-lender, who lent *J.* the money for this purpose. The accused was convicted on the 2nd of September 1899 by the Deputy Magistrate of Rangour, of offences under ss. 342 and 384 of the Penal Code of wrongfully confining *J.* and of extorting from him Rs. 200 under a threat that he would not be released, unless the money were paid. The accused appealed to the Sessions Judge of Rangpur, and contended that the complainant and all the witnesses for the prosecution, who took any part in the transaction, were accomplices and unworthy of credit. The Sessions Judge, however, being of opinion that the money was advanced by *P.* in the ordinary course of business, and that, therefore, the mere fact that *P.* was aware of the purpose for which money was borrowed, did not make him an accomplice, considered his evidence accordingly, and dismissed the appeal on the 21st of December 1899.

Babu *Dasarathi Sanyal*, for the petitioner.

Babu *Srish Chunder Chowdry*, for the Crown.

Cur. adv. vult.

JUDGMENT.

1900, APRIL 2. The judgment of the Court (PRINSEP and STANLEY, JJ.) was delivered by

PRINSEP, J.—The petitioner, a Sub-Inspector of Police, has been convicted of offences under ss. 342 and 384 of the Penal Code, that is

* Criminal Revision No. 101 of 1900 against the order of A. E. Harward, Esq., Sessions Judge of Rangpur, dated the 21st December 1899.

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of wrongfully confining Jagat Chunder Chuckerbutty, and of extorting from him Rs. 200 under a threat that he would not release Jagat Chunder Chuckerbutty, unless the money were paid. It is found that this money was paid on this account by Panchu Behari Saha, a money-lender, who lent Jagat Chunder [927] the money for this purpose. In hearing this appeal the Sessions Judge held that Panchu was not an accomplice, and he considered his evidence accordingly. A rule has been granted to consider this matter, because if Panchu is an accomplice, the evidence has not been properly considered on the appeal. It is contended before us that the money was an illegal gratification, that, therefore, the offence, if any, committed is under s. 213 of the Penal Code, rather than extortion under s. 384. In one sense the offence may be so regarded, and in that case Panchu might be regarded as an accomplice, but on the evidence we think that it is sufficiently shown that the money was not voluntarily given, and it was not given in consideration of the Sub-Inspector not proceeding against Jagat Chunder for the purpose of bringing him to legal punishment. It was given to obtain his release from police custody in which he was detained on no reasonable or sufficient ground, and it was extorted, because the Sub-Inspector refused to release him, as he was bound to do, unless he were paid that money. A person paying such money under such circumstances cannot be regarded as an accomplice of the Sub-Inspector in such misconduct. There are, therefore, no sufficient grounds for holding that the Sessions Judge on appeal has not properly dealt with the evidence of Panchu as not that of an accomplice.

The rule is discharged.

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27 C. 927 = 4 C.W.N. 757.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Ameer Ali.

IN THE GOODS OF BHUGGOBUTTY DASI (*Deceased*).*
[27th March, 1900.]

Probate—Caveat—Executor—Propounder of will—Caveator—Costs.

A party cognisant of proceedings in an action for probate or letters of administration and not objecting to the grant is not as a rule entitled to have the matter reopened and the grant revoked. In this case he was allowed to reopen the case under certain circumstances and upon certain conditions.

[R., 10 Ind. Cas. 717 (718) = 14 O.C. 77 ; 14 C.W.N. 1068 = 7 Ind. Cas. 740 (742).]

ON the 8th May 1899 Prosonnomoyi Dasi applied for probate of the will of the deceased, whereby she had been [928] appointed the sole executrix. A caveat was filed opposing the grant by two persons, Adhore Chunder Dutt and Gopal Chunder Dutt, sister's sons of the deceased, and the matter was set down for hearing as a contentious cause. The hearing lasted for several days, and on 23rd February Babu Akhoy Kumar Mitter, attorney for the caveators, was examined, and his cross-examination had proceeded to a certain extent when the case was adjourned. On that day Mr. Mitter, who was the leading counsel for the caveators, stated that he had gone through the evidence again, and that he had advised his client to withdraw the caveat, and that he had

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* Suit No. 17 of 1899.

mentioned this to Mr. Chakravarti, who was the leading counsel for the propounder and had asked him not to press for costs. Mr. Chakravarti thereupon stated that, if the Court sanctioned it, he would not press for costs, but that, as his client was an executor and trustee, he could not give up costs without the sanction of the Court. It would, however, benefit the estate by avoiding further litigation and trouble, if he gave up costs. The Court thereupon delivered judgment holding that the will had been duly proved, and ordered probate to be granted to the said Prosonnomoyi Dasi.

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In the above proceedings one Roma Nath Addy, another sister's son of the deceased, had filed an affidavit in support of the caveat, and given evidence on behalf of the executors, but had filed no caveat. On the same day that the caveat was discharged and probate ordered to issue, Roma Nath Addy, through his Attorney Babu Akhoy Kumar Mitter, entered a caveat in the said goods.

Subsequently there was a change of attorney from Babu Akhoy Kumar Mitter, to Mr. N. C. Bose.

Roma Nath Addy also filed an affidavit stating that there were other witnesses besides those examined whom he wanted to call and that the former caveators had withdrawn the caveat upon grounds not known to him.

Mr. *O'Kinealy*, for Roma Nath Addy.—The applicant is not precluded by the former proceedings from having the matter reheard, inasmuch as he has fresh evidence to put forward. The cases, which might be said to preclude him, do not apply to circumstances like the present, where the caveat has been withdrawn **[929]** by agreement. The cases, which lay down that a person who has had notice of the former proceedings, is precluded from opening up the matter again are *Komollochun Dutt* v. *Nilruttun Mundle* (1), *Brinda Chowdhrain* v. *Radhica Chowdhrain* (2), *Nistariney Dabia* v. *Brahmomayi Dabya* (3), and *In the matter of Pitamber Girdhar* (4). The circumstances under which a Court will grant a re-hearing are laid down in *Wytcherley* v. *Andrews* (5) and *Peters* v. *Tilly* (6).

Mr. *Chakravarti* (Mr. *S. R. Das* and Mr. *H. D. Bose* with him), for the propounder.—This case does not come within any of the exceptions. There was no compromise here as there was in the case of *Wytcherley* v. *Andrews* (5), and in *Peters* v. *Tilly* (6) it was a question of a fresh will. The case of *Ratcliffe* v. *Barnes* (7) shows that a next of kin, who is cognisant of a suit between the executor of a will and another next of kin ending in the establishment of the will, is not at liberty to oppose probate of the will being taken. That case followed the decision of Sir John Nicoll in the case of *Newell* v. *Weeks* (8). All the Indian cases are to the same effect.

JUDGMENT.

1900, MARCH 27. AMEER ALI, J.—On the 8th of May 1899 Prosonnomoyi Dasi applied for probate in respect of the will of a Hindu lady named Bhuggobutty. There were various proceedings anterior to that application, but it is not necessary to refer to them for the purposes of

(1) 4 C. 360. (2) 11 C. 492. (3) 18 C. 45.
(4) 5 B. 638. (5) (1871) L.R. 2 P. & D. 327. (6) (1886) L.R. 11 P. & D. 145.
(7) (1862) 2 Sw. & Tr. 486. (8) (1814) 2 Phil. 224.

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the present judgment. It is enough to state that upon Prosonnomoyi applying, as aforesaid, two persons named Adhore Chunder Dutt and Gopal Chunder Dutt entered a caveat against the grant of probate.

The case was, accordingly, set down as a contentious cause and came on for hearing on the 8th of February last. The [930] trial lasted over a considerable number of days, and the propounder's witnesses were cross-examined at enormous length, no detail was left unquestioned, and every single matter open to attack or criticism was subjected to a searching cross-examination.

On the 23rd of February Akhoy Kumar Mitter, attorney for the caveator, Gopal Chunder Dutt (his brother Adhore having died previously), was examined, and his cross-examination had proceeded to a certain extent when the case was adjourned.

Before his evidence had commenced Mr. Mitter, who was leading Mr. Chaudri, stated that that was his last witness, and that, save and except a person with whom some other will was alleged to have been deposited, he would not call any other witness.

The case came on for further hearing on the 27th of February, and on that day, on its being called on, Mr. Mitter said as follows :—

"I have had an opportunity of going through the evidence, and of considering what has fallen from the Court, and, having regard to that, I have advised my client to withdraw the caveat, and I mentioned this to Mr. Chakravarti, who has stated that he will not press for costs."

With regard to that Mr. Chakravarti said: "I did so as I am appearing for trustee, and the chance of getting costs from the people before the Court on the other side is so small and may put the estate to more expense, that I thought it advisable not to press for costs.

Asks for probate to his client. Upon that I passed the following judgment:

"Mr. Mitter in the exercise of his discretion has, in my opinion, very properly taken a course on behalf of his clients, which I was certain on consideration would commend itself to him, and I thoroughly approve of the course taken. He has withdrawn the caveat on behalf of his client, and Mr. Chakravarti for the reasons given by him and minuted does not press for costs. I approve also of the course taken by him."

"The caveat being thus withdrawn I am not called upon to [931] express any opinion upon the evidence given on behalf of the caveators, but I am entitled to say that on the evidence given by the propounders, which I consider reliable and satisfactory, the factum of the will is conclusively established. I may add that it being the question of the estate of a deceased person, had I felt that the evidence of the caveators was such as to raise any doubt in my mind as to the factum of the will, I should have hesitated before giving effect to the application for withdrawal of the caveat, but my opinion on the evidence, so far as it has proceeded, is so clear that, approving, as I do, of the course taken by learned counsel for the caveators, I unhesitatingly pronounce in favour of the will and direct that probate do issue to the propounders."

On the very same day through the very same attorney, who was acting for Gopal Chunder Dutt and the widow of Adhore Chunder Dutt, Roma Nath Addy, who had given evidence on behalf of Gopal Chunder, filed a fresh caveat against the grant of probate. Naturally the attorney for the plaintiff protested against the proceeding and wrote a letter which runs as follows: "I understand that you, acting as attorney for Babu Roma Nath Addy, have filed a caveat against the grant of probate to my

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client. All that I can point out to you is that it is a gross abuse of the order of the Court. Babu Roma Nath Addy had notice of the application long ago, and he had given his evidence in Court and the case lasted for so many days, and then at last when the order was made, he files a caveat.

However I must ask you to file your grounds in support of caveat at once, so that the case may be heard and decided without delay."

In reply to this protest Akhoy Kumar Mitter, on the 1st of March, wrote a letter which need not be set out in full as the commencing passages are sufficient to give an indication of its character.

" My client does not see how he is prevented from questioning the genuineness of the will, because his cousin, Gopal Chunder Dutt, and the wife of one of his deceased cousins, Srimati Shusila Coomaree Dassee, chose to withdraw the caveat entered by them in the above goods."

[932] Something was said about the proceedings being somewhat hurried. I was surprised at this observation as the Counsel who made it knew from his experience how unadvisable delay in a matter like this is, and if any one expected that I should allow this case to be hung up for a year or eighteen months I can only say he was very much mistaken.

The caveat of Roma Nath Addy having been filed through Babu Akhoy Kumar Mitter, regarding whom I shall say a few words before I finish, a change was made to another attorney, the object of which is obvious. At this stage it is desirable that I should state what the position of Roma Nath Addy was in the case which had been heard by me for such a length of time.

Adhore Chunder Dutt and Gopal Chunder Dutt were the two sons of a sister of the deceased Bhuggobutty Dasi. Roma Nath Addy alleged himself also to be a son of another sister, and stated in his evidence which he gave in Court in support of the caveat, and in denial of his signature to the alleged will that he, Gopal Chunder Dutt and Adhore Chunder Dutt, lived all along in the house of Bhuggobutty Dasi. He stated that he knew of the proceedings which had been taken by his cousins, and that, inasmuch as his interests were assured by their action, to paraphrase his language, he did not think it necessary to file any caveat. He also pleaded want of means. In the course of Gopal Chunder Dutt's deposition, which I am entitled to take into consideration in dealing with the whole matter and with the *bona fides* of the present application, it appeared beyond a shadow of doubt that not only was Roma Nath privy to the proceedings taken by his cousins—not only was he cognisant of all that was being done, but that he was actively associated with them and managed the case and instructed the attorney.

One word more before I go on to the legal position this man takes up here.

When I stated in my judgment that "the caveat being withdrawn I am not called upon to express any opinion on the evidence given by the caveator," I had in my mind the course which had the case proceeded to a conclusion, I intended to take with regard to the witnesses; for my opinion being as the case progressed, and as I scrutinised the testimony and demeanour of the witnesses [933] for the caveator that some of them at least had grossly perjured themselves, I intended directing their prosecution, and I did not mean to stop there. I also intended calling upon the attorney to explain on affidavit his conduct in holding communication with a witness whom he knew to be the witness of the propounder, and whom he allowed to come into his office in order to get a statement.

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But as Mr. Mitter, very properly in my opinion, came to the conclusion that he should advise his client to withdraw the caveat, I did not consider it necessary to proceed further. I may add that, if the case had proceeded to the end, one of the persons against whom I should have ordered proceedings to be taken in the Criminal Court would have been the present applicant.

I mention this only to explain the reserve with which I dealt with the evidence of the caveator, not that I had any doubt, but simply to abstain from giving expression to the distinct impression I had formed. The case for the will was proved incontestably *per testes.*

As I said before the witnesses for the plaintiff were cross-examined most minutely and elaborately. No possible ground was left untouched.

At first Mr. Chaudri and Mr. Sinha appeared for the caveators. At the second stage they were represented by Mr. Mitter and Mr. Chaudri, and the names of those learned gentlemen are enough to carry a guarantee that the case was conducted with ability and vigour. What are the grounds on which Roma Nath Addy now comes in to reopen the entire proceedings that ended on the 27th of February last?

In paragraph 5 of his affidavit, originally filed on the 7th of March 1900, his ground is thus stated:—

"I further say that in consequence of a caveat having been entered by Adhore Chunder Dutt and Gopal Chunder Dutt, two of the sons of Srimatti Rajomoyi Dassi, who is another sister of the said Srimatti Bhuggobutty Dasi, against the grant of probate to the said Prosonnomoyi Dassi of the said document as the will of the said Srimatti Bhuggobutty Dasi, I did not consider it necessary to file a caveat on my own behalf, until I found that [934] for reasons unknown to me, and on account of the death of the said Adhore Chunder Dutt, the caveat filed on behalf of the said Adhore Chunder Dutt and Gopal Chunder Dutt was withdrawn." There can be no doubt that the above statement is false.

In his affidavit Roma Nath says nothing as to when or how he came to know of the withdrawal of the caveat. Nor does he venture to say that he was prevented from intervening in the action, the moment he learnt of the course Gopal Chunder was going to take. It is a bare statement that the former caveat having been withdrawn, he now comes forward to contest the will. Yesterday, the 26th of March, fully a month after the withdrawal of Gopal Chunder's caveat he puts in an affidavit, in the 2nd paragraph of which he states as follows: "I further say that some days after my evidence was concluded I heard from the said Gopal Chunder Dutt and Adhore Chunder Dutt that they had withdrawn their caveat, but I was not aware what transpired between the date of my examination and the withdrawing of the said caveat or the reasons which led to the said withdrawal."

It may be noticed by the way that Adhore Chunder Dutt had been dead long before the case came on for hearing.

This is sufficient to shew the recklessness with which he has sworn to facts in his affidavits.

He states there are certain witnesses he would have called but whom the persons conducting the proceedings did not call.

It is perfectly clear on the authorities, both here and in England, that, if a party is cognisant of proceedings for letters of administration or probate, and chooses to stand by and allow the proceedings to be concluded

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in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings reopened. In *Newell* v. *Weeks* (1) Sir John Nicoll stated exactly the principle on which matters of this nature are dealt with, and that case has been accepted as an authority both in England and here.

That learned Judge referring to two cases set out in his judgment held that inasmuch as the parties who were applying were spectators of and privy to the whole proceedings and might have intervened at any time it shewed that they had not sustained [935] any prejudice, and had no right to come in to object to the grant of the probate.

In that case also new facts were alleged, but the learned Judge put them aside on the ground that they were too late.

That case was followed in *Ratcliffe* v. *Barnes* (2) which to a large extent is analogous to the present case.

The facts as given in the report were as follows: The plaintiffs in that case were the executors of the will of Joseph Barnes, and the defendant, John Barnes, was the son of the said Joseph Barnes. A sister of the defendant had entered a caveat, and the executors had propounded the will. Several pleas had been raised in opposition to the will and issue was joined on those objections. The issues were tried under an order of the Court before Martin, B., and a jury at the Liverpool assizes, and a verdict was returned in favour of the will. An application for a new trial was made and rejected, and the Court had pronounced for the will.

The plaintiffs then applied for probate, when they were met by a caveat entered by the defendant, a brother of the defendant in the previous suit. The plaintiffs thereupon filed a petition praying that probate might pass notwithstanding the caveat, and that the defendant might be condemned in costs. It was admitted that the defendant was cognizant of the former suit, and had assisted his sister in the conduct of it.

The learned Judge in the Court of Probate dismissed the objections summarily, and held upon *Newell* v. *Weeks* that probate must issue notwithstanding the caveat.

The same question came up in the Bombay High Court before Sir Charles Sargent in *In the matter of Pitamber Girdha* (3). In that case a will, dated the 5th of February 1879, was propounded by one Navivahoo. The petitioner had entered a caveat, but at the close of the evidence given in support of the will he had without calling any evidence declined to proceed with the case. The Court then found in favour of the will of the 5th [936] February 1879. He subsequently applied for a rule *nisi* calling on the executors to shew cause why the probate should not be revoked and cancelled; and he brought in another will, dated the 1st of February 1879, alleging that that was the real will of the deceased, and that the will of the 5th of February 1879 was a forgery.

The learned Chief Justice dealing with the matter relating to the right of the petitioner or any body else to apply for revocation of the probate expressed himself thus:—

"It was next contended that the petitioner, having been concerned in the proceedings which resulted in the grant of pobate, is precluded from now seeking to have the probate revoked. The rule in England is clear, that when once probate in solemn form has been granted, no one who has been cited or who has taken part in the proceedings, or who

(1) 2 Phil. 224. (2) (1862) 2 Sw. & Tr. 486. (3) 5 B. 638.

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was cognisant of them, can afterwards seek to have it cancelled;" and he held that the rule was applicable to the Courts here. Then dealing with another part of the case he says on p. 642: "On behalf of the petitioner's case it was argued that, although the petitioner might be precluded from applying for revocation of the probate by reason of his having been caveator in the former proceedings, the other executors named in the will of the 1st February 1879 did not labour under the same disability; as they had not joined in the caveat, nor had they been cited by the widow, and it was contended that the petition might be amended by inserting their names. It is admitted, however, that they were fully aware of the former proceedings, if indeed they were not actively engaged in supporting the case of the caveator, and I think, therefore, that they are equally bound with him by the decision of the Court, and that the rule laid down in *Radcliffe* v. *Barnes* and *Newell* v. *Weeks* prohibits them also from applying for revocation of the probate that has been granted."

The two cases cited by Mr. *O'Kinealy* in support of his proposition that in this case the order for probate having been made on withdrawal of the case is not binding on any body else, except the persons directly concerned, seems to me not [937] to apply at all. *Wytcherley* v. *Andrews* (1) was quite an exceptional case. It was on a distinct compromise and one of a supicious kind upon which the order had been made.

In the case of *Peters* v. *Tilly* (2) the witness who could speak to the second will had been out of the country for many years, and his whereabouts having been ascertained the Court gave liberty for taking his evidence; at the same time it ordered that the proceedings instituted for the establishment of the second will should be stayed, till the applicant's costs in the previous case had been paid.

That was a totally different case to the present. In the case before me, I am of opinion on the whole of the evidence which was before me and which I am bound to take into consideration that Roma Nath Addy was not only a witness to the case and privy to the proceedings and cognisant of all that was taking place, but that he was closely associated with the caveators. To use the words of Sir John Nicoll he "was substantially a party to that suit quite as much as if he had actually appeared a spectator to the whole and privy to the whole. If he had been dissatisfied he might have intervened at any moment of the proceedings." The case was decided on the evidence of the witnesses carefully tested by cross-examination, and I found in favour of the will. It seems to me it would be lamentable to allow the whole matter to be reopened. It would not only be a gross abuse of the process of the Court, but would turn it into an engine of oppression and be a means of harassment to innocent persons.

On these grounds I think that I am not justified in making an order directing what it would really amount to, a revocation of the order for the grant of probate.

However, and in order to avoid the least semblance of grievance, I am willing to do this.

Holding that Roma Nath Addy was privy to the previous proceedings and fully cognisant of them, if he in the course of a week pays to the plaintiff all the costs both of the former proceedings, and of the present proceedings upon his application up to [938] date to be

(1) (1871) L.R. 2 P. & D. 327. (2) (1886) L.R. 11 P. & D. 845.

taxed on scale 2, and gives security within the same period for further costs to the satisfaction of the Registrar, this case will be set down for hearing on Wednesday next, and will be taken up at the stage at which it stopped. In other words I will allow the cross-examination of the attorney to be concluded, and the witnesses mentioned in Roma Nath's affidavit, and no more, to be examined.

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If those costs are not paid within the week and security given as aforesaid, the caveat will stand discharged and probate will issue immediately.

The plaintiff's bill can be submitted to the taxing officer at once, and I direct that the taxation of it shall have precedence over other bills.

Attorney for the propounder: Babu *Romes Chunder Bose.*
Attorney for the caveator, Roma Nath Addy: Mr. *N. C. Bose.*

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PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Davey, and Robertson, and Sir Richard Couch.

[*On appeal from the Court of the Recorder of Rangoon.*]

YEO HTEAN SEW (*Plaintiff*) v. ABUZAFFER KORESHI (*Defendant*).
[15th February and 24th March, 1900.]

Mortgage—Construction of mortgage—Covenants as to payment of interest—Default in payment of interest.

A mortgage-deed contained covenants for payment at the expiration of a year from its date, with interest to be paid month by month, in the month following that for which it should be due, and to run on from the date of the mortgage at the same rate until the money borrowed and the interest should be paid. It was also covenanted that if before the end of the year the mortgagors should make default in payment of interest during one month after it had become due, in that case the principal and interest should thereupon become claimable. With the latter requirement the mortgagor failed to comply, not paying the interest within the stated time.

Held that, on the true construction of the deed, this default having taken place this suit would lie for both the principal and interest accrued due within the year.

[939] APPEAL from the Recorder's decree (16th May 1899) dismissing the appellant's suit with costs, as prematurely brought.

This suit was brought by the appellant upon a deed of mortgage, dated the 22nd October 1898, in the English form, securing repayment of Rs. 75,000, borrowed for one year from the date of the instrument. The clause for redemption provided for payment of the principal, with interest, at the rate of ten per cent. per annum, from the date of the deed, payable month by month, on the 22nd of each month following that in respect of which it was to be due. The clauses giving rise to the question, whether this suit was prematurely brought, now decided, appear in their Lordships' judgment.

The mortgagor covenanted to pay interest at the same rate until actual payment should be made. There was also a clause that in case of default in payment of the interest for one month from the date fixed for such payment, the whole sum secured, principal and interest, should become due.

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On the 22nd November, 1898, the defendant had paid Rs. 200 on account of their due, but paid no more. On the 13th January following the plaintiff brought this suit, claiming the principal and interest with it, down to that date.

The defences in the written answer were, first, that the claim was for a penalty and not enforceable; secondly, that the suit as brought was premature, the year not having elapsed before suit.

The Officiating Recorder fixed issues on both these points. As to the first he considered that it was to be decided on the ground of authority of judicial decisions against such a claim being regarded as a penalty, from which equity would relieve. But as to the second he held it to be a good ground of defence. His reasons he gave as follows:—

"I now have to consider if at the time when the suit was filed any default had been made in payment of any interest due under the mortgage for the space of one calendar month so as to bring cl. 4 into operation. The only provision for payment of interest is made by cl. 3, which provides for payment on the 22nd October 1899 of the principal and interest thereon at the rate of 10 per cent. per annum, computed from the date of the instrument, with a further proviso that if the principal shall not be so paid then the mortgagor will pay interest after the rate aforesaid until the same shall be fully paid and will pay all such interest (which can only mean the [940] interest then immediately provided for) month by month on the twenty-second day of each month succeeding that for which it should become due.

"It is true that cl. 4 contemplates default by the mortgagor in payment of interest due under the deed before the 22nd October 1899, but as there is no covenant or stipulation by him for payment of mesne interest, I think he is entitled to contend, and to contend successfully, that the suit is premature. Great reliance has been placed by plaintiff's counsel on *Prosad Doss Dutt* v. *Ramdhone Mullick* (1), but it is clear from the opening words of the judgment of Peacock, C. J., that it can be plainly distinguished from this case in that the deed under consideration contained a covenant that the mortgagor would on the 4th September 1866 pay or cause to be paid to the mortgagee his executors, administrators, representatives and assigns, the sum of Rs. 23,000 and would also in the meantime pay interest for the same; so that, as the learned C. J. pointed out, it was clear that interest was to be paid between the date of the deed and the time fixed for payment of the principal. In the deed before me there is no such stipulation, and it would only be by reading a clause into the deed that is absent that this case could be rendered identical with *Prosad Doss Dutt* v. *Ramdhone Mullick*, and the plaintiff be entitled to a decree.

"The suit is dismissed with costs."

1900, FEBRUARY 15. Mr. *J. Fox*, for the appellant, argued that the deed of mortgage had not been correctly construed in the judgment. On the true construction of its clauses, interest was payable from the date of the mortgage, the 22nd October 1898, and regard should be had especially to cls. 4 and 9. Those appeared to have been inserted in contemplation of the case of interest not being paid by the times fixed for payment of it, and they showed the intention of the parties that the effect of default in making that payment should be as stated in cl. 4; in other words, to render the whole amount secured, with the interest already accrued due thereon, at once payable, and payable before the expiration of the year, if

(1) 1 Ind. Jur. N. S. 255.

default should be then made. He referred to the statement and conduct of the defendant, and contended that he was aware that the deed might be so construed.

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The respondent did not appear.

Cur. adv. vult.

JUDGMENT.

[941] 1900, MARCH 24. Their Lordships' judgment was afterwards delivered by

SIR RICHARD COUCH.—By a mortgage-deed, dated the 22nd of October 1898, the respondent in consideration of Rs. 75,000 granted certain lands in Rangoon to the appellant subject to a proviso for redemption by payment on the 22nd of October 1899 of Rs. 75,000 with interest after the rate of Rs. 10 per cent. per annum computed from the date of the deed and payable as thereinafter provided. The mortgagor covenanted with the mortgagee as follows :—

"3. That the mortgagor will on the 22nd day of October 1899 pay to the mortgagee the sum of Rs. 75,000 and will also pay interest for the same after the rate of Rs. 10 per cent. per annum computed from the date of these presents, and if the said sum of Rs. 75,000 shall not be paid on the said 22nd day of October 1899 then the mortgagor will pay to the mortgagee interest thereon after the rate aforesaid until the same shall be fully paid and satisfied, and will pay all such interest month by month on the 22nd of each month succeeding that for which it shall become due.

"4. That if before the said 22nd day of October 1899 the mortgagor shall make default in payment of the interest due hereunder for one calendar month after becoming due then in that case the principal sum of Rs. 75,000 and interest shall thereupon become due and payable."

On the 13th of January 1899 the mortgagee brought a suit against the mortgagor alleging in his plaint that the mortgagor had only paid Rs. 200 for over two months as interest and thereby failed to comply with the requirement of cl. 4 of the mortgage-deed, and that the sum of Rs. 76,508 was due for principal and interest on the mortgage, and praying for an order to the defendant to pay that sum on a day to be named by the Court and in default that the mortgaged premises might be sold and the proceeds applied in payment.

The defendant by his written statement admitted the allegations in the plaint and submitted that the provision in cl. 4 was a penalty which the plaintiff was not entitled to enforce and that the suit was premature. The suit was tried by the Officiating Recorder of Rangoon who on the 16th of May 1899 dismissed it. He held that the provision in cl. 4 did not create a penalty, in which their Lordships agree with him, but as there was no covenant or stipulation for payment of "mesne interest" by the **[942]** mortgagor the suit was premature. The mortgagee has appealed and the question to be determined is whether the mortgage-deed contains such a covenant.

In cl. 3 the mortgagor covenants that he will on the 22nd of October 1899 pay the principal sum with interest computed from the date of the deed, and if the principal shall not be paid on the 22nd of October 1899 that he will pay interest thereon after the same rate until the principal shall be fully paid. Then follow the words and "will pay *all such interest* month by month on the 22nd day of each month succeeding that for which it shall become due." According

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to strictly grammatical construction "such" would refer only to the interest payable after the 22nd of October 1899, but it is capable of meaning the interest for the previous year covenanted in the first part of the clause to be paid, or it may be considered to mean interest at the rate fixed. If it does not mean the interest in the first part of the clause no part of the first year's interest would be payable until the end of that year although after that time the interest is to be paid month by month. It is not reasonable to suppose that the mortgagee would agree to this. Then the introduction of the word "all" is not without significance. If the concluding words of the clause were meant to apply only to the part which immediately precedes them "all" is unnecessary. Combined with "such" it helps to show what is meant, and that the clause should be read as one sentence and not as if the first part is separate from what follows it. Clauses 4 and 9 of the deed support this construction. Clause 4 assumes that there is an obligation to pay interest before the 22nd of October 1899. If there is not there cannot be default before that day in payment of the interest and the clause can have no operation. Clause 9, which provides that if at any time either before or after the 22nd of October 1899 the interest due under the mortgagee is in arrear to the extent of Rs. 500 and unpaid for three calendar months after becoming due it shall be lawful for the mortgagee to sell the premises, also assumes that there is a covenant to pay interest at some time during the first year, otherwise the interest could not be in arrear before the 22nd of October 1899. The construction which their Lordships put upon "all such interest" makes the different clauses in the deed consistent, and they are of opinion that the suit ought not to have **[943]** been dismissed. They will therefore humbly advise Her Majesty to reverse the decree appealed against and to order that upon the defendant paying to the plaintiff within six months from the date of Her Majesty's order the sum of Rs. 75,000 the principal and Rs. 1,508 the interest, due on the mortgage mentioned in the plaint, together with the costs of this suit in the Recorder's Court as taxed by the Court, and further interest on the said principal at the rate of Rs. 10 per cent. per annum, from the date of institution of suit, *viz.*, 13th January 1899, till payment, the plaintiff do reconvey to the defendant the said mortgaged premises free and clear from all incumbrances made by him, and to deliver up to the defendant all deeds and writings in his custody or power relating thereto; but in default of the defendant paying to the plaintiff such principal, interest, costs, and further interest as aforesaid, by the time aforesaid, that the said mortgaged premises be sold, and the money to arise by such sale be paid into Court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest, costs, and further interest as aforesaid, and the balance (if any) shall be paid to the defendant; but if the proceeds of sale shall not be sufficient for the payment in full of such principal, interest, costs, and further intereet, then that the defendant do pay to the plaintiff the amount of such deficiency with interest thereon at the rate of six per cent. per annum until such payment. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant : Messrs. *Hopgoods & Dowson.*

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PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Davey, and Robertson, and Sir Richard Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

RADHAMONI DEBI (*Plaintiff*) *v.* THE COLLECTOR OF KHULNA AND OTHERS (*Defendants*). [23rd February and 24th March, 1900.]

Title—Evidence and Proof of Title—Possession—Alleged title by adverse possession for more than the period of limitation.

Land bordered by the estates of each of the parties contesting its ownership was registered in the Collectorate as a separate mauza, as it also was represented to be in a Revenue survey map of 1856. In a subsequent survey [944] map of 1865 it appeared as being within the limits of the defendants' adjoining talukh. Neither from these maps nor any other documents was there evidence of title in either party, so that possession was all that could be resorted to as the ultimate test of right.

The plaintiff relied on limitation. She asserted more than twelve years' adverse possession by having settled tenants on the disputed ground. To entitle her, it was necessary for her, the burden of proof being upon her, to prove that she had held a possession adequate in continuity, in publicity, and in extent of area. Upon all these points her case was deficient, and therefore her claim failed.

It was also in evidence, which was the more substantial, that the defendant had occupied during that period a part of the land by tenants ; and this, as proof of possession on his part, applied not only to the plots actually tenanted under him, but was contradictory to the whole theory of the plaintiffs' claim.

[**F.**, 31 C. 397 (404) ; 8 A.L.J. 247 (251)=10 Ind. Cas. 742 ; 3 C.L.J. 316 (331) ; 13 C. L J. 30 (32) ; 13 C.L.J. 625=6 Ind. Cas. 392 ; **R.**, 26 B. 410 (416)=4 Bom.L.R. 28 ; 28 B. 94 (101)=5 Bom.L.R. 708 ; 6 C.L.J. 735=12 C.W.N. 127 ; 6 Ind. Cas. 359 ; 14 C.L.J. 578=16 C.W.N. 317 (318)=10 Ind. Cas. 376 ; 15 C.L.J. 281 =14 Ind. Cas. 609 (623) ; 10 C.W.N. 343 ; 17 C.W.N. 595=18 Ind. Cas. 869 ; **D.**, 3 Ind. Cas. 431.]

APPEAL from a decree (22nd June 1894) of the High Court reversing a decree (17th May 1892) of the Subordinate Judge of Khulna.

This suit was brought on the 24th May 1887 for the proprietary possession of tracts forming a mauza named Uttar (north) Kulati, otherwise called Durgapur, bordered on the south by the plaintiff's mouza Kulati, and on the north by the defendant's property, a talukh named Bhil Pabla.

Uttar Kulati was entered as a mauza in the Collectorate record of Jessore, and afterwards as a mauza No. 134 in the District of Khulna, when the latter had been in 1882 separated from the Jessore District. At two revenue surveys, one in 1856 and the other 1865, mauza Uttar Kulati was mapped. In the first it was represented as a separate mauza ; but in the second it appeared as within the boundary of Bhil Pabla. In 1874, Bhil Pabla being then in the possession of the Collector as part of a trust estate, the Syedpur trust, he leased Bhil Pabla to Jogendra Nath Roy, who sold his interest in 1876 to Prosonnocoomar Mitra, now represented by his two sons, Basant Komar, and Mohendra Nath Komar. His widow Srimoti Shoshimukhi Mitra and three other Mitras were also defendants. Disputes as to the ownership of mauza Uttar Kulati having arisen between the plaintiff and Prosunnocoomar, on the 31st August 1885, a Magistrate's

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714.

order directed that the Mitras were to retain the possession [945] which they then had of the mauza, until they should be evicted in due course of law.

The plaintiff's case was that she and her late husband, Gokal Chander Acharje, before her, had been in possession "adversely to others" by settling tenants on the disputed mauza for more than twelve years, and that she had thus acquired a title. The plaint set forth the survey map of 1856, alleged that the Collector of Jessore had not interfered, and denied the correctness and authenticity of the map of 1865, asking that the order of 31st August 1885 might be set aside, and that possession might be decreed to her.

The substantial defence was a denial that the plaintiff, or her predecessor, had ever been in possession, with an averment that the land was part of the defendants' Bhil Pabla. It was also objected that the Collector of Khulna, who was agent for a four-anna share of the Syedpur trust estate, which owned Bhil Pabla, should have been made a party to the suit. This objection was the first issue. Judgment was given on the 27th February 1889 by the Subordinate Judge in favour of the plaintiff on the issues relating to title by adverse possession. But on appeal, the High Court on the 9th January 1890, having taken up the first issue remanded the suit to the first Court for the Collector to be made a party defendant, and for a new trial.

The Collector's written statement then filed was identical with the defence of the Mitras, but with the addition that possession had not been held by the plaintiff within twelve years of suit brought, which thus was time-barred. A second time an Amin investigated and reported (ss. 392, 393 of the Civil Procedure Code) and confirmed a prior report.

The result was again in favour of the plaintiff after a hearing by the successor in office of the Subordinate Judge. But exception was made of certain bighas tenanted by cultivators, located by the defendants. These were decreed to the latter.

On an appeal by the defendant to the High Court a Division Bench (O'KINEALY and HILL, JJ.) reversed that judgment and dismissed the suit altogether. The Court found that no part of the mauza in dispute was within the boundaries of the plaintiff's [946] mauza Kulati. From that the mauza Uttar Kulati was quite distinct. Their judgment was that the plaintiff had failed to prove possession of the land for twelve years before the dispossession, which she alleged to have taken place in 1885, when the Magistrate's order under s. 145 of the Criminal Procedure Code, was passed. In 1885 that order had declared that the defendants, and not the plaintiffs, were in possession of about 400 bighas ; and in 1856 there were only 16 acres under cultivation in the whole mauza. Even now the only residents on the whole of the disputed area were a few people who had grown cocoanut and mango trees, and without doubt they had been in possession for 15 or 16 years. They added that they entirely concurred in the view of the lower Court which gave the bighas so occupied to the defendants, but observed that the Judge had passed over the significance of the fact that the only old and permanent tenants residing in the mauza were tenants of the defendants. In dealing with title by prescription the Judicial Committee had remarked that it lay on the plaintiff to give cogent evidence ; *Wise* v. *Brojendro Coomar Roy* (1), and *Wise* v. *Amirunnissa Khatoon* (2). The oral evidence was conflicting, but the High

(1) 18 W.R. P. C. 91. (2) 7 I. A. 73.

Court found that in 1885 the defendants were in possession of more of the disputed land than was held by the plaintiff. It did not appear probable that the Collector's tenant, who had succeeded in establishing a village in the middle of the land now in dispute, would have allowed the plaintiff to obtain possession, where he, the tenant, had become a lessee with a long lease, with possession delivered to him. Down to 1883 there was but little evidence of any dispute, and the High Court found no proof of possession by the plaintiff in that year.

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On this appeal by the plaintiff.

1900, FEBRUARY 23. Mr. *C. W. Arathoon*, for the appellant, argued that on the evidence, including that taken by the two amins and their maps and reports, the judgment of the first Court was right. Weight was justly attached to the survey map of 1856, and the finding that Uttar Kulati was unconnected with Bhil Pabla was correct. The thak map, according to **[947]** the amins, correctly showed that the northern boundary of the mauza Uttar Kulati coincided with the southern boundary of Bhil Pabla. The conclusion should be that the plaintiff and her predecessor in title had located, with title so to do, cultivators on the ground who were there till long past the commencement of the twelve years' period before the institution of this suit. The Subordinate Judge before the remand, and his successor after the remand, rightly held that the plaintiff had substantially proved her title by adverse possession.

Mr. *A. Cohen*, Q. C, and Mr. *J. H. A. Branson*, for the respondents, argued that the appellant's claim to sue was barred by the effect of s. 22, Act XV of 1877, the Limitation Act (providing that a suit is to be deemed to have been instituted when an added defendant has been made a party), coupled with the effect of sch. II, art. 47, fixing the period of limitation of three years to have set aside an order under chap. XI of the Criminal Procedure Code. On the question of possession, on which the title rested, the plaintiff had failed to prove her claim. The evidence had not shown a complete, or shown a continuous, possession by her at any period within the twelve years immediately preceding the suit; and there had been no title gained by adverse possession against the defendant for the period of twelve years before the Magistrate's order of the 31st August 1885. The appellant had failed to prove that the land in suit was within the limits of her estate of Kulati, and the Judges of the High Court had rightly held that it was comprised within the respondent's estate of Bhil Pabla, and was occupied by his tenants at the time of the litigation in 1885.

Mr. *C. W. Arathoon* replied.

Cur adv. vult.

JUDGMENT.

1900, MARCH 24. Their Lordships' judgment was delivered by

LORD ROBERTSON.—The respondents are in possession of the land in dispute by virtue of a Magistrate's order granted in August 1885. The onus is, therefore, on the appellant who claims the land to make out that she has the better right.

In considering the question thus raised it is well to have in mind the nature of the disputed land. Its area is about 1,400 **[948]** bighas, but it is a significant fact that the most various estimates on this subject have been made during the period in dispute, the reason being that very few people had occasion to be there or were interested in its size. The degree

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to which this is the case may be gathered from two facts. It is clearly ascertained that in 1865 there were no human beings living on any part of the ground, and only one-twentieth of the whole area was susceptible of cultivation. At the time of this action there was only one small group of dwellings. The ground, generally speaking, is jungle; but there has been in some parts, more or less of intermittent cultivation.

The two competitors for this territory are, on the one hand, the Collector of Khulna (who will hereafter be referred to as the respondent), whose lessee is in possession and whose theory is that this is southern part of his talukh of Bhil Pabla, and on the other hand the appellant who is the undoubted proprietor of the mauza of Kulati which lies to the south of the disputed land. An important feature of the case however is that the appellant's theory is not that the land forms part of the mauza Kulati but that it forms a separate mauza bearing the name of Uttar Kulati and lying between Kulati and Bhil Pabla. Although the vicissitudes of this prolonged dispute might naturally have suggested the simpler view, the appellant has never pretended that the disputed ground is part of the mauza Kulati and this is not suggested on the record. The sequel will show that this is not a merely nominal distinction.

With the doubtful exception of a lease of the disputed land said to have been executed in 1846, the history now to be considered opens in 1856. What then happened was that a survey of the ground was made by the Government Collector and a thak map was prepared, depicting the ground as forming a separate mauza of Uttar Kulati. So far as it goes, this directly supports and substantiates the appellant's case. The map, it is true, shows on its face the facts already mentioned as to the entire absence of population and the extremely exiguous amount of cultivable land. Accordingly, it cannot be treated as a contemporaneous record of possession so much as of a publicly asserted claim.

[949] That claim moreover was not allowed for long to stand unchallenged. In 1865 a Government survey was made of Bhil Pabla and the map then prepared records on its face that it was made to rectify the thak map, which had included in other mauzas parts of Bhil Pabla. The ground in dispute is depicted on the plan as having been so treated. As compared with the map of 1856 the map of 1865 has this in its favour that it bears on its face that the survey was made in the presence of the officers and tenants of the owners of the adjoining mauzas, whereas no such circumstance is recorded on the map of 1856. There has been some controversy as to the occasion of this map being made and as to its authorship; but the evidence and the conduct of parties make it clear that it is entitled to no less than the degree of authority which attaches to Government surveys generally. If the map of 1856 records the claim of the appellant, so and with equal authority does the map of 1865 record the repudiation of that claim. The one wipes out the other and leaves the parties to appeal to possession as the ultimate criterion of their rights.

The appellant however cannot escape from this branch of the case without it being noted that the theory of her map is the theory of her record, that this ground was not part of her mauza Kulati but was a mauza of itself, bounded by Kulati and bearing the separate name of Uttar Kulati.

In considering the question of possession it is necessary to remember its twofold bearing on the dispute. The appellant's claim is rested first on her title to the mauza of Uttar Kulati, and second on the

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statutory limitation, she having had (so she asserts) 12 years adverse possession of the land in dispute. Now what has been to some extent overlooked by the Subordinate Judge is that the evidence of possession affects both questions and not merely the second question. In the view taken by their Lordships of the maps of 1856 and 1865, the appellant has no case on title, unless she has adequately supported by possession her claim embodied in and affirmed by the map of 1856.

When the evidence of possession is examined, it is found to be divisible into two kinds having very different values. On the one hand there is an abundant supply of evidence on paper, leases and documents of various kinds, and on the other hand there is meagre [950] and conflicting evidence of actual physical possession. Neither feature need excite surprise. The ground has in fact been little used, hence little evidence of physical possession ; the ground has for fifty years been the subject of claims, hence paper grants to support those claims.

Now in the inquiry conducted in the Court of the Subordinate Judge the relative values of those two kinds of evidence have scarcely received due appraisement. Even assuming the authenticity of the lease of 1846 (which singularly enough describes the land as "Uttar Kulati *alias* Durgapur"), it is confronted by the appellant's own plan of 1856 which attests the absence of effective occupation. Similar criticism applies to much of the evidence from pottahs and kabulyats ; and, even where some testimony of physical possession emerges from the mass of documentary evidence, it is found to be exiguous in amount, in some instances uncertain in time and place, and in many instances irreconcilable with equally plausible contrary assertions.

Their Lordships find it impossible to hold that from these materials the appellant has made out her claim of title to the land. Her claim under the statute of limitations remains to be considered, but this question gives rise to very much the same observations within a more restricted region of inquiry.

It is necessary to remember that the onus is on the appellant and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded and is indeed evidenced by the dispute which ended in the Magistrate's order of 1885. But the possession required must be adequate in continuity, in publicity, and in extent, to show that it is possession adverse to the competitor. The appellant does not present a case of possession for the twelve years in dispute, which has all or any of these qualities. The best attested cases of possession do not cover the whole period and apply to small portions of the ground. While exhibiting those positive deficiencies, the appellant's case is moreover confronted by tangible evidence of possession by the respondent which is far superior in quality. The only persons living on the ground hold and have held their dwellings and cultivated [951] the ground round it by rights derived through Jogendra from the respondent. As has been justly observed in the High Court, the true significance of this evidence was missed in the Court of the Subordinate Judge. It is not merely negative of the appellant's case so far as that portion of the ground is concerned which has been so possessed by the respondents, but it is directly contradictory of the whole theory of the appellant's case of possession.

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Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: *The Solicitor, India Office.*

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PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Davey, and Robertson, and Sir Richard Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

GRISH CHUNDER LAHIRI (*Plaintiff*) *v.* SHOSHI SHIKHARESWAR ROY (*Defendant*). [14th February, and 24th March, 1900.]

Mesne profits—Assessment of mesne profits in execution—Civil Procedure Code (Act XIV of 1882), *s.* 211—*Local investigation by amin—Civil Procedure Code, ss.* 392, 393—*Dakhilas or rent-receipts of tenants—Rents which by ordinary diligence might have been obtained—Interest—Discretion of Court in declining to take evidence after the Report.*

The Court executing a decree for mesne profits commissioned an amin, under s. 392 of the Civil Procedure Code, to make a local investigation as to them. He was unable to obtain the rent dakhilas of tenants. He inquired as to the prevailing rates of rent for the land which he measured, and included in his estimate of the mesne profits rents which with ordinary diligence might have been obtained.

Upon objections taken the questions arose: (1) whether the assessment should have proceeded only upon the rents actually realized, or the amin was right in taking the rent last mentioned into the account; (2) whether the evidence of the rent dakhilas was essential; (3) whether interest, not mentioned in the decree, should have been allowed; (4) whether or not evidence, on the application of the objector, should have been taken by the Court after return of the evidence taken in the locality by the amin together with his report.

[952] *Held*, as to (1), that inclusion, in the assessment of mesne profits, of rents which at the prevailing rates might have been received by ordinary diligence, was authorized by s. 211 of the Civil Procedure Code.

As to (2), that the dakhilas were important evidence but not essentially necessary.

As to (3), that the expression "mesne profits" included, under s. 211, interest on them; but this could only be allowed for not more than three years from the decree or until possession within that time.

As to (4), the question must be decided on general principles in each case. In this instance judicial discretion had been rightly exercised in the Court executing the decree declining to take fresh evidence.

[**F.**, 25 A. 275 (276) = 23 A.W.N. 42; 6 A.L.J. 327 = 2 Ind. Cas. 464; **Rel.**, 16 C.L.J. 517 = 15 Ind. Cas. 719 (720); 16 C.L.J. 586 = 17 C.W N. 87 = 15 Ind. Cas. 735; 10 Ind. Cas. 975 (977) = 4 S.L.R. 244; **Expl.**, 6 C.L.J. 14 N; **R.**, 23 A. 252; 24 A. 376 (380) = 22 A.W.N. 90; 33 C. 329 (331); 6 C.L J. 462; 7 C.L.J. 197 (201) = 12 C.W.N. 285; 14 C.W.N. 872 (874); 8 Ind. Cas. 162 (163) = 9 M L.T. 35; 16 Ind. Cas. 205 (207) = 18 C.W N. 542; 16 Ind. Cas. 866 (867); 72 P.L.R. 1914 = 45 P.W.R. 1914 = 22 Ind. Cas. 526; 20 C.L.J. 512.]

APPEAL from an order (20th February 1894, of the High Court, reversing an order (31st March 1892) of the Subordinate Judge of Rajshahi, and remanding the proceedings as a whole for further inquiry.

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The order now appealed from remanded for disposal, according to principles stated by the High Court, the proceedings of the Subordinate Judge determining in execution the mesne profits of an estate comprising village lands in the District of Rajshahi.

The principal questions decided related to the mode of assessment of mesne profits within s. 211 of the Civil Procedure Code; to the non-production of rent dakhilas; to the allowing interest on mesne profits; and to whether the first Court rightly excluded further evidence after the return of evidence and report of an amin commissioned under s. 392 to make a local investigation as to the amount of mesne profits. The facts are stated in their Lordships' judgment, from which it will be seen that Bireswar Roy left two sons, Shikhareswar and Maheswar, and a daughter, Barodasunderi. The elder son died in 1865 leaving a son, Shoshi Shikhareswar, the respondent in this appeal. The suit was brought by the appellant, a son whom Barodasunderi adopted to her deceased husband and to whom she left her property. Maheswar, the second son, who died in 1873, left three sons, Tarokheswar, Biseswar, and Kaseswar, who were co-defendants with their cousin, and parties to the decree in the execution of which these proceedings took place; but they were not parties to this appeal. In 1870 Barodasunderi died, and Grish Chunder became entitled, under her will, to her property consisting mainly [953] of gifts of land made to her by her father, Bireswar, whose estate on the 23rd April 1873 was taken possession of by the Collector as manager of the Court of Wards on behalf of the sons, they being then minors. Grish Chunder was thus deprived of possession of mauzas Benodepur and Harifala, with other land, to recover which he brought on the 15th September 1882 the suit in which the mesne profits awarded to him were the subject matter of these proceedings. On the 23rd December 1883 he obtained the decree of that date. In 1885 he received possession of all the properties decreed to him, except one called Nyadiar, which was found in the execution proceedings not to have been made over to him till 1891.

On the 8th January 1890, Grish Chunder petitioned for execution of the decree as to mesne profits, applying for them to be assessed for three years prior to his suit commenced in 1882 down to the date of possession delivered to him; that they should be ascertained by an investigation through the amin of the Civil Court; that a measurement and jummabandi of lands ordered to be pointed out by the decree-holder should be made; that reference should be made to the dakhilas of the tenants; and that the proper rents during the period of the judgment-debtors' possession should be ascertained and allowed together with interest.

On the 14th February 1891, the Subordinate Judge commissioned, under s. 392, an amin to report as to the amount of the mesne profits giving him the following directions to inquire:—

1. "What will be the amount of mesne profits of the decreed land from the year 1286 to the month of Bhadro 1289?

2. "What quantity of crops could with due diligence have been grown during the period of dispossession on the lands, which were in the nij cultivation of decree-holder in villages Harifala and Sabrul before the period of dispossession, and what would be the value thereof at the bazar rate?

3. "Whether any portion of the lands decreed lay waste during the time of the plaintiff's possession; if so, what was its quantity and what

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was the rate of rent; and if any land lay waste during the time of the judgment-debtors' possession, what was its quantity and what its rate of rent; and whether the decree-holder has sustained any loss on account of the non-settlement of [954] the said two classes of waste land owing to the laches of the judgment-debtors; and if so, what amount of loss has been sustained by him?

4. "What may have been the value of the produce of the gardens held in khas by the decree-holder during the period of dispossession?

5. "What may be the mesne profits of the lands which were settled with tenants during the period of dispossession; and whether any land was settled at a low rate by the judgment-debtors during the period of dispossession; and if so what loss has the decree-holder sustained on that account?

"In order to ascertain these facts it is necessary to make measurement of the lands, and to ascertain the proper rates and rents and to show separately and in detail the mesne profits of the different items as ascertained after receiving oral and documentary evidence and making a khatian of the dakhilas of tenants."

On the 1st September 1891 the amin made his report, which found that the income of the properties was Rs. 2, 686 by the year. The total for five years and a half amounted to Rs. 14, 774.

The Subordinate Judge allowed an objection taken by the appellant to the Court's receiving evidence in addition to that embodied in the amin's return. The Judge refused to receive further evidence on the grounds: (1) that it had not been stated what matters would be proved by the new evidence; (2) that it had not appeared that the amin had either omitted to give an opportunity for the evidence to be adduced, or had declined to receive any evidence tendered; (3) that to take fresh evidence without sufficient reason assigned would not be carrying out the object of ss. 392, 393 of the Civil Procedure Code in establishing a local inquiry by a Commissioner for the purposes mentioned.

By his order of the 31st March 1892 he substantially accepted, with a few alterations of detail, the report of the amin.

On appeal the High Court (BEVERLEY and AMEER ALI, JJ.) to a great extent reversed that order. They remanded the proceedings to the Court below, directing further investigation, and they stated principles for the guidance of the Judge in the inquiry as [955] to mesne profits. He had considered the course taken by the amin to be the right one in finding by measurement the area of land, of the several kinds, within each mehal; and in ascertaining by reference to the rates prevailing in the locality the rate at which each bigha could presumably be tenanted. It had been objected before the Subordinate Judge that the amin ought to have ascertained, by inspection of the dakhilas of tenants, the rent actually paid by them.

To this objection the High Court were of opinion that effect should be given, holding that there had been no conduct shown on the part of the defendants, some of whom were minors during the period to which the inquiry related, which threw on them the burden of proving what profits the estate had yielded. For the production of the evidence as to that they were not responsible. In reference to the principle of inquiring as to possibly greater profits with greater diligence the High Court differed from the Court below. As to the most valuable of the estates, Harifala and Benodepur, the Judge said, "what the Subordinate Judge ought to

have done was to ascertain the actual assets of the estate, the mesne profits of which were claimed and to award the same to the plaintiff; and that the Judge has not done." 1900 MARCH 24.

A special point as to Harifala was its measurement. Revenue papers as to this mauza had been produced showing a certain area, while the amin by a measurement of his own made out an area far greater. No evidence whatever had been produced to show what the income as a revenue mehal had been of Harifala. The High Court said, "we therefore think that the proper course as to Harifala, would be to allow both parties to give evidence as to the actual assets received from that jote prior to dispossession. Should the plaintiff be unable to give any satisfactory evidence on that point, we think that it would be right to proceed upon the statement of the defendant if borne out by the revenue entry." Regarding Benodepur there was also a difference of opinion between the original and the appellate Court as to the rental obtained about the year 1867.

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Moreover, the Subordinate Judge only allowed 5 per cent. as charge for collections. This was raised by the High Court to 10 [956] per cent. as a matter of ordinary practice well recognized in these Courts, and supported by the evidence in the case.

The Subordinate Judge allowed interest upon the mesne profits of each year. This was disallowed by the High Court on the ground that the original decree did not award interest on mesne profits, and that if it was discretional to grant interest, the dilatory conduct of the plaintiff disentitled him to it.

The original Court allowed mesne profits upon Nyadiar up to 1298 (1891), when the plaintiff said he got actual possession. The High Court held that there was nothing to show why he did not get possession in 1885 along with the other property, and therefore rejected his claim as to this.

The High Court did not agree with the Subordinate Judge in the view that he took of the right of the objector to adduce evidence in Court. Additional evidence, if forthcoming, they considered should be taken, referring to a judgment in the case of *Azim Sarung* v. *Almooddeen* (1). They set aside the order of the Subordinate Judge, and remanded the case, for the purpose of ascertaining the mesne profits to which the plaintiff was entitled according to the opinions expressed by them.

On this appeal,

1900, FEBRUARY 14. Mr. *J. H. A. Branson*, for the appellant, argued that the principle on which the mesne profits had been assessed was the right one, and that it should have been upheld by the High Court. The judgment of the High Court on two main points, one relating to the mode of assessment, and the other relating to the interest on the mesne profits, was inconsistent with the explanation in s.211 of the Civil Procedure Code, which defined mesne profits to mean those profits which the person in wrongful possession actually received, or, with ordinary diligence might have received from the property, together with interest on such profits. The liability enacted in the section in regard to the absence of ordinary diligence was not to be understood to be occasioned only by the wilful default, to which the High Court had referred. On the contrary, to bring into the assessment [957] rents that with ordinary diligence might have been received, but actually were not obtained, was within the

(1) 17 W. R. 270.

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direction contained in s. 211. The High Court had said that the Subordinate Judge ought to have ascertained the actual assets of the estate of which the mesne profits were claimed, and that he had not done so. They attributed this as an error. It was submitted that the Subordinate Judge had been right in maintaining the correctness of the amin's course of proceeding in the absence of such evidence as might have been obtained for the dakhilas had they been produced.

Reference was made to *Hurro Durga Chowdrain* v. *Surat Sundari Debi* (1), where it was stated, as their Lordships' opinion in a judgment which preceded the alteration in s. 211, that the amount which might have been received from the land, deducting the collection charges, represented the profits of the land.

There was no reason why such importance should be assigned to the dakhilas given to tenants to prove the income of the estate. Among other evidence it might well be considered that they were of the first importance. But they might, in a possible case, indicate rates lowered unreasonably for the landlord's own purposes; and, if they should happen to be withheld, a resort to other materials for arriving at a just assessment of mesne profits was completely consistent with s. 211.

There was also a misapprehension in the High Court's reversing the decision of the Subordinate Judge as to allowing interest on the mesne profits. This the appellate Court has disallowed on the ground that it was not mentioned in the decree of the 23rd December 1883.

The definition of mesne profits in the explanation in s. 211 rendered it unnecessary that interest should be so specified. This the section did by stating of what mesne profits were to consist. Interest was plainly included therein. The High Court, refusing it, had referred to *Kishna Nand* v. *Partab Narain Singh* (2), where the Judicial Committee had not interfered [958] with the refusal of the Indian Courts to allow interest on mesne profits. That case, however, hardly supported the argument of the judgment now appealed from; and it was a case that was decided on the 19th May 1881, before the enactment of the Civil Procedure Code of 1882. And in that case the dispossessed talukhdar was charged with nothing more than was received by him, there being nothing to show that he could be charged with more.

Also, there was no good ground for the remand of the proceedings in regard to the refusal of the Subordinate Judge to hear further evidence after the return of the evidence and the report. No valid objection could be taken as to the conduct and result of the inquiry. In point of fact the present respondent had given no evidence on the local inquiry, but had left the case where the appellant had left it. It was to be observed, moreover, that the remand was irregular, being a remitting of the whole proceedings without specifying points, or framing issues, to which the evidence was to be directed. As to the further evidence reference was made to *Azim Sarung* v. *Almooddeen* (3), and *Mahabir Pershad* v. *Radha Pershad Singh* (4).

Mr. *J. D. Mayne*, for the respondent, argued that the judgment of the High Court was right in so far as it differed from that of the Subordinate Judge. The amin had not proceeded on the right principle in taking the quantities of land within the mehals together with the prevailing rates as sufficient data for his conclusion. He should have started by getting the details of actual receipts by the landlord from the tenants. He ought

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(1) 8 C 332 = 9 I.A. 1.
(2) 10 C. 785 = 11 I.A. 88.
(3) 17 W.R. 270.
(4) 18 C. 540.

to have examined the pottas and dakhilas for rent, ascertaining from them what rents were claimable and what had been paid. This would have been a substantial basis. The authority of the Code, in s. 211 to resort to what might have been collected, with ordinary diligence, was given as an alternative course to be taken. It was consistent with explanation in that section that there should have been ascertainment of the actual receipts, with a distinction as to what greater profits might with ordinary diligence have been received.

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[959] As to the interest awarded in the lower Court, mesne profits did, by the definition in s. 211, include interest. But it did not follow that interest must be allowed by a Court in all cases. It was a matter for the decision of the Court in each case, and here the High Court had pointed out that the decree was silent on the subject while there was good reason for the omission in the appellant's long delay in making his claim, and in the long period that he allowed to elapse without suing out execution. The High Court had rightly corrected the period for which interest could be claimed. As to the general remand by the High Court it was true that the Court had not conformed to s. 566 of the Civil Procedure Code. But that should be regarded as a mere error of procedure which should not prevent the substantial matters from being now decided. On the question of the reception of evidence in addition to that returned by the amin, it was within the discretion of the Court to receive it, and it would here have been a right exercise of discretion to have done so.

Mr. *J. H. A. Branson* replied.

Cur. adv. vult.

JUDGMENT.

1900, MARCH 24. Their Lordships' judgment was delivered by

LORD HOBHOUSE.—The defendants in this case are grandsons of one Bireswar Roy who died many years ago. The respondent is the senior of them and the only one who had attained majority when this suit was instituted. It is he who has conducted the defence throughout. The plaintiff, now appellant, is also a grandson of Bireswar in this sense, that Baroda, Bireswar's daughter, adopted him. Bireswar made several grants of property to Baroda which the plaintiff claimed after her death either as heir or as devisee. Possession of them was taken by or on behalf of the defendants, and in the year 1882 the plaintiff sued to recover them. The question to be decided in this appeal arose in the execution of the decree then obtained by the plaintiff.

The decree is dated 23rd December 1883. It declares the plaintiff's right to the villages or estates of which he has been dispossessed, and it proceeds thus: "And that he do get from the defendants khas possession of the same and mesne profits for the period of dispossession, and the Rs. 2,400 claimed for maintenance [960] allowance; that the mesne profits be ascertained on inquiry at the time of the execution of decree; and that the plaintiff do get from the defendants a total of Rs. 1,255 7 annas 9 pies on account of the costs in this suit, with interest from this day till the day of realization at the rate of Rs. 6 per cent. per annum."

In the year 1885 the plaintiff obtained possession of all estates, except one called Nyadiar, of which he did not obtain possession till May 1891. The present proceedings for account and recovery of mesne profits were commenced by petition filed in January 1890. The plaintiff asked for

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mesne profits for three years prior to the institution of the suit up to the date of recovery of possession.

On the 14th February 1890 the Subordinate Judge appointed an amin to conduct the inquiry and gave him written instructions how to proceed. Another amin was afterwards substituted for the first, but he proceeded on the same instructions.

On 1st September 1891 the second amin made his report which finds a sum of Rs. 14,774 due for mesne profits. The respondent filed a petition of objection on 19th September 1891 afterwards summarized and slightly varied on 28th November 1891. The case was heard by the Subordinate Judge on 31st March 1892. He passed a judgment, which in most respects maintains the amin's report. The respondent appealed to the High Court who, differing from the Subordinate Judge on several points both of principle and detail, set aside his order and remanded the case for the purpose of ascertaining the mesne profits which the plaintiff is entitled to in accordance with their foregoing observations. That is the order from which the plaintiff now appeals. The case runs very much into details, but there are some matters of principle to which their Lordships will first address themselves.

As regards the form of the order which in effect throws the whole account open again, Mr. Mayne was asked whether under the provisions of the Code which relate to remands it was not necessary to state more specifically the issues which the Subordinate Judge is required to decide on remand; and he did not dispute that the remand made was incorrect. That miscarriage in procedure, however, though important, does not affect the legal [961] merits of the questions in dispute between the parties. If on those questions their Lordships agreed in substance with the High Court the decree could be brought into conformity with the directions of ss. 562—566 of the Procedure Code. But with few and unimportant exceptions their Lordships after hearing full argument have to express agreement with the views of the Subordinate Judge.

The most important point on which the High Court hold the Subordinate Judge to be in error is the mode in which the amount of mesne profits is ascertained. The Subordinate Judge directed the amin to ascertain as to certain nij lands, the value of the crop which could have been grown upon them; as to some waste lands, their rates of rent; as to some gardens held khas, the value of their produce; as to land settled with tenants, their mesne profits; and whether any land was settled at a low rate by the judgment-debtors during the period of dispossession.

He continues—

"In order to ascertain these facts, it is necessary to make measuremnt of the lands, and to ascertain the proper rates and rents, and to show separately and in detail the mesne profits of the different items ascertained, after receiving oral and documentary evidence and making a khatian of the dakhilas of tenants."

From an *interim* report made by the first amin to the Subordinate Judge on 20th September 1890 it appears that the plaintiff was making slow progress. He said there were four or five hundred tenants on the land; that they would not appear voluntarily, being under the influence of the debtors; that there was difficulty in finding them, and in serving summonses during the rainy season. The amin adds that he is instructed to inspect the dakhilas of tenants which will take a long time because of their number, and by the time that is done the land will be dry enough for measurement. In the meantime he is putting pressure on

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the plaintiff who, as he intimates, has not shown sufficient activity. Upon this report being made the plaintiff presented a petition alleging that the delay was due to the amin who would not or could not come to the place before the rains. Shortly afterwards the change of amins took place.

The report of the second amin, who did all the work that [962] was done, again shows the difficulties that beset the plaintiff in the inquiry.

"It was difficult for the decree-holder to adduce more evidence than that found on the spot, because the judgment-debtors are powerful zemindars of the place and all the tenants are under their control and obedient to them. The decree-holder is a man in ordinary circumstances. He was not a man of influence or power in the mofussil, so that he could duly muster the tenants and prove his cause or make them file their dakhilas, and satisfactorily establish his case. . . . Notwithstanding that the judgment-debtor No. 1 (the present respondent) was repeatedly called upon to produce the collection papers, the papers showing the lands and their jummas, no papers were produced on his behalf; and the evidence that was taken of the few witnesses on his behalf was not sufficient. A sheet of paper containing the rates of rent of Sabrul village, which was produced on his behalf, was an incomplete copy, and it can hardly be relied on."

Under these circumstances the amin had recourse to other evidence. As regards Harifala, one of the largest properties, he made a map according to the boundaries given in the decree. These boundaries were verified by witnesses on both sides. Then he found the quantity by actual measurement, and ascertained by the collection papers and such other evidence as he could get the rates at which the land could be let. Apparently he pursued the same course as regards Benodepur, the only other large property.

The defendant's objection is that the amin did not proceed on the basis of the tenants' dakhilas or receipts for rent. The Subordinate Judge holds that the amin did rightly. The High Court think otherwise. They say that the Subordinate Judge has charged the defendant on the basis of wilful default, and that there is no case for such a charge. What he ought to have done was to ascertain the actual assets of the estate. They comment on the absence of rent receipts, and consider that in their absence the evidence is insufficient to show the value of the lands.

There are then two questions raised on this part of the case: 1st, whether the Subordinate Judge was bound to ascertain the actual assets, by which, as their Lordships understand, the learned [963] Judges mean the actual amount of money or value which reached the hands of the defendants; and 2ndly, whatever was to be ascertained, whether it was essential to resort to the evidence of rent receipts.

It seems to their Lordships that the first question is settled by the Code of Civil Procedure. The original Code of 1859 did not contain any definition of mesne profits. The Code of 1877, s. 211, added an explanation: "Mesne profits of property mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom." In the existing Code of 1882 that explanation is repeated with an addition which gives rise to another dispute in this case, *viz.*, "together with interest on such profits." The amin, as directed by the Subordinate Judge, has tried to ascertain the very thing which the Code directs. He called for evidence of actual receipts.

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Whether if that had been produced it would have satisfied the inquiry cannot be known. It might still have been necessary to enquire into the possibility of larger receipts by ordinary diligence. But the plaintiff could not, and the defendant who was the actual recipient would not, produce the evidence So the amin turned to the other alternative, *viz.*, to ascertain what might have been received with ordinary diligence. The Subordinate Judge's order does not charge the defendants with wilful default. Indeed, if it did, it would adopt a principle more favourable to the defendant than that of the Code; for there may be values recoverable by ordinary diligence which yet it would not be wilful default not to recover. Wilful default is charged against persons in rightful possession though accountable for their dealings with the property. These defendants were wrongfully in possession. And *prima facie* it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land, and that the true owner wrongfully dispossessed has been a loser by that amount.

This view is quite consistent with holding that the proper evidence was not procured. The High Court attach great importance to the dakhilas and quite rightly. They are not indeed so important as they would be if the inquiry was confined to the [964] actual receipts, because from various motives lands may be let at rates lower than the ordinary ones. Still in deciding a dispute on the question what is the ordinary rate, actual payments made by tenants must always be of value. But it is clear from the reports of both amins that the plaintiff had great difficulty in procuring this evidence. The Subordinate Judge says speaking of Harifala:

"As regards this item, the judgment-debtor contends that the amin is wrong in not ascertaining the amount of wasilat by referring to the dakhilas of the tenants, but by finding the quantities of the several kinds of lands contained within the mehal and the rate at which each bigha of land could be let out. I cannot say that the amin is wrong therein. All the tenants and all the dakhilas of each tenant could not be found. They are mostly ryots of the defendant judgment-debtor. The defendant should have produced all of them and made them produce all their dakhilas; and when he did not produce them and make them produce all their dakhilas, I cannot say that the amin was wrong in not ascertaining the amount by reference to the dakhilas. Again the principle of ascertaining the amount by reference to the dakhilas is wrong. It may be, as urged by the decree-holder, that the judgment-debtor let out the lands at a rate lower than the ordinary one in order to make the tenants come over to his side. I am, therefore, of opinion that the amin was right in ascertaining the amount by finding out the quantities of the lands contained within the mehal and the rate at which each of them could be let out."

Moreover the defendant was the beneficial owner of the rents for which these dakhilas were given, and though he may have been a minor for part of the time the evidences of receipt by his guardians must be in his power. It has been shown above what the second amin says of his silence. It is clear that he could if he pleased have put in evidence which would show whether the inferences of value drawn by the amin would or would not stand the test of actual transactions between lessor and lessee; but he did not call the tenants with their receipts or produce his own accounts. Their Lordships asked Mr. Mayne whether the defendant had given any counter-evidence at all to rebut the plaintiff's case, and he

answered that none could be found, the plaintiff's case being left precisely as he put it before the amin and the Subordinate Judge.

On this part of the case it appears to their Lordships—1st, that the Subordinate Judge rightly apprehended what is the proper object of an inquiry into mesne profits; and 2ndly, admitting [965] the tenants' receipts to be evidence of value and possibly of great value, they were not necessary evidence; their importance has been overrated owing to a misapprehension of the object of the inquiry; and the defendant's failure to put them in has been visited by the Court on the head of the plaintiff.

Another question, important in principle, though it cannot be ascertained of what practical importance it was to the result of the case, is whether the Subordinate Judge ought to have received further evidence after the amin's report. It seems that after lodging objections the defendant summoned witnesses and on their non-appearance applied for warrants of arrest. The following is the Subordinate Judge's note of what passed in Court:—

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"An objection has been preferred on the part of the decree holder that the judgment-debtor has no right to put in new evidence. It does not appear what matters the judgment-debtor seeks to prove by producing witnesses. An amin is appointed to ascertain the wasilat after taking evidence from the parties, and this was the case in this instance. It appears that both parties have adduced evidence before the amin. The evidence which each party needed to adduce ought to have been produced before the amin. It has not been objected that the amin did not give the judgment-debtor an opportunity to adduce evidence, or that he declined to receive any evidence which has been already presented. No reason appears why the judgment-debtor should now be allowed to adduce evidence, which he might have and ought to have produced before the amin, but which he of his own accord withheld. If such a thing is allowed, then the main purpose connected with ascertainment of wasilat by the amin, and of the laws and circulars relating thereto, will stand defeated. Consequently, additional evidence in this matter cannot now be taken."

The High Court think this decision was wrong and they found their opinion on a judgment delivered by Sir Richard Couch in the case of *Azim Sarung* v. *Almooddeen* (1). That report is one of the large number contained in *The Weekly Reporter* which are useless or misleading, because the facts of the case are not stated The only point of law or of practice laid down in the judgment is that the Court will treat the amin's report as part of the evidence in the suit, and will take other evidence if necessary. If that judgment is taken as laying down that it is necessary to take further evidence whenever one of the parties chooses, it has been misconstrued. The High Court in that case considered the [966] further evidence necessary and the reason given for rejecting it insufficient. Why, we do not know, because no facts are stated except the tender of the evidence and its rejection.

The sections of the Code (392, 393) which relate to local investigations do not contemplate the tender of further evidence after an amin's report, except the examination of the amin himself, but they do not forbid it. They are consistent with either course, and the point must be decided on general principles according to the facts of each case.

In every trial there must come a time when it is proper that the evidence should be closed. After that time new evidence should not be

(1) 17 W. R. 270.

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given as a matter of course or without the assent of the Court. As regards local inquiries it may in many cases be clearly proper and convenient to take evidence in Court after taking it in the locality. In others it may be equally clear that the locality is the proper place and the time of inquiry the proper time for bringing the proposed evidence. In this case the most obvious time for closing evidence on the inquiry was the presentation of the amin's report, which is itself made evidence by s. 393. What reason did the defendant give for adducing further evidence? None whatever, either in his written objections to the report or in his grounds of appeal from the Subordinate Judge. He did not even state what was the nature of the evidence he desired to submit, nor does the High Court state it, nor can the counsel at the bar now state it. It may for all that appears be purely frivolous. The learned Judges below do not in terms affirm the absolute right of every party to a local investigation to adduce evidence before the Court after a Commissioner's report. But their decision cannot be supported unless that right exists; however much the party may have neglected to produce his evidence at the proper time and in the proper place; even though, as in this case, he has disregarded repeated demands of the amin for his evidence, and even though, as in this case, he either cannot or will not state what is the nature of his fresh evidence, nor why he brings it so late, which may be because a discussion in the locality does not suit him so well as a discussion at a distance. Their Lordships agree with the Subordinate Judge that such a practice would, at least to a great extent, defeat the very object of [967] local investigation. The whole case might be tried over again not in the locality but at the distant seat of the Civil Court. It seems to them that the Subordinate Judge has applied sound principles of adjudication to the facts of the case.

Another point on which the High Court reverse the decision of the Subordinate Judge is the allowance of interest on the profits as ascertained year by year. Mr. Branson has shown that there is error in supposing that the interest has been calculated with quarterly rests, but that is not the ground of the judgment. The learned Judges below think that the decree did not award any interest at all. That depends on the construction of s. 211 of the Code which imports into the expression "mesne profits" the addition of "interest on those profits."

The learned Judges say that the Court has still jurisdiction to give or refuse interest as it chooses. Their Lordships agree, because mesne profits are in the nature of damages which the Court may mould according to the justice of the case. But the question is what is the effect of a decree which grants mesne profits and says nothing about interest, which, as their Lordships think, is the proper construction of the decree in this suit. The learned Judges treat that silence as equivalent to a decision that there shall be no interest. But then it is difficult to see what effect is given to the alteration made in s. 211 in the year 1882. Its obvious effect is to provide that a simple decree for mesne profits shall carry interest on them. No reason has been assigned for holding the true effect to be other than the obvious one. If the Court does not intend to give interest it should say so. The learned Judges give reasons for thinking that interest ought not to be given in this case. But in execution proceedings we are only construing the decree and not considering its merits. The case which is cited from 11 Indian Appeals, 88 (*Krishna Nand* v. *Partab Narain Singh*) (1) has no bearing on the present one. The defendant there

(1) 10 C. 785.

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was the manager of an encumbered estate under special statute and not in wrongful possession at all. The decree for account expressly disallowed interest. On appeal this Board refused to interfere with the discretion of the Courts below. Speaking in 1884, their Lordships declined to say "whether in [968] the present state of the law, having regard to the provision in the Procedure Act in which there is an explanation of mesne profits, interest was allowable."

Another question arises out of a tankha, or annuity, of Rs. 400 per annum granted in perpetuity by Bireswar to Baroda. It was specially secured to her by providing that she might deduct the amount out of the rent reserved and payable by her upon grants made to her of the Benodepur and Harifala estates by Bireswar. Of these properties the plaintiff was dispossessed. The amount of tankha up to date was recovered by decree. In estimating mesne profits after decree the defendant claimed to be allowed the reserved rent which was not disputed. But then the plaintiff claimed to set off the tankha against it, and the Subordinate Judge allowed it. The High Court have disallowed it. Their Lordships confess themselves unable to understand the reasons of this disallowance as printed in the report; nor could Mr. Mayne explain them. It is not alleged that in any way the plaintiff has got the benefit of the tankha twice over. He is certainly entitled to it once. It must be held that the Subordinate Judge was right.

On two small items, 3 and 4, in the amin's index, relating to a property called Sabrul, an unusual kind of controversy has arisen. The Subordinate Judge states that no party raised any objection to these items. At the hearing of the appeal before the High Court the defendant's counsel denied this statement and produced an affidavit from one of the defendant's amlas to the effect that objection was taken. The learned Judges, observing that no contrary affidavit had been produced, thought that the two items should be the subject of adjudication. In point of fact there was a contrary affidavit by the plaintiff himself, who was in Court during the whole hearing before the Subordinate Judge, instructing his pleaders; but this must somehow have been overlooked. It has been shown by the amin's report that the defendant produced to him a paper relating to the rates of rent in Sabrul, but in such an imperfact state as to be useless. In the defendant's detailed objections to the amin's report Sabrul is not mentioned. In the summary Sabrul is placed among a list of five properties of which it is alleged in general terms that the rates of rent and the classification of lands are wrong. It [969] strikes their Lordships as highly inexpedient that such a controversy should be raised by affidavit before the High Court without any application to the Subordinate Judge himself. If these items stood alone they would not, on the materials before them, feel justified in sending the case back to the Subordinate Judge; but as this must be done on other points it may be more satisfactory to have this dispute cleared up.

Other items which constitute points of difference, all comparatively small, may be briefly disposed of. On the question of collection charges, whether they should be 5 or 10 per cent., which is not made the subject of evidence, their Lordships think it right to follow the High Court. As to the village of Nyadiar their Lordships agree with the High Court. The Subordinate Judge gives the plaintiff mesne profits up to the date of possession. But that is more than three years from the date of the decree and to the extent of the excess is unauthorised by s. 211 of the Code. As regards Chakran Pakuria and Ghosepara, in which cases the learned Judges think

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that the Subordinate Judge has made mistakes of a clerical kind, the mistakes have not been shown to their Lordships, and the amounts must be very small, such as of themselves would hardly justify further inquiry. But as the account has to be rectified in some particulars it may be reviewed on these points also.

There are several subjects on which the High Court state that the evidence is unsatisfactory to them; such as charges for fruit trees, for fruit-bearing land, and for cesses; and the existence and extent of khamar land in Benodepur. Their Lordships make the general observation that the appreciation of evidence by the High Court is and necessarily must be subordinated to their view of the proper issue to be tried, as to which their Lordships have expressed agreement with the Subordinate Judge. None of these subjects has been laid before their Lordships in any detail, and they see no reason why the conclusions arrived at, first by the amin and afterwards by the Subordinate Judge, should be disturbed under a general re opening of the whole account.

Their Lordships will state the heads of the decree which they think the High Court should have made on the appeal to them. [970] Declare that the collection charges should be at the rate of 10 instead of 5 per cent. and refer it to the Subordinate Judge to re-model the account accordingly. Declare that mesne profits for Nyadiar should not be allowed for any later time than three years from the date of the decree, and refer it to the Subordinate Judge to re-model the account accordingly. Refer it to the Subordinate Judge to ascertain whether he has erroneously allowed mesne profits for Ghosepara twice over, and whether he has in his final estimate allowed mesne profits for Chakran Pakuria which in his detailed judgment he disallowed. Refer it to the Subordinate Judge to make a formal adjudication on items 3 and 4 in the amin's index. Let the Subordinate Judge finally readjust the amount recoverable by the plaintiff in accordance with his findings on the foregoing references. *Quoad ultra* dismiss the appeal with costs in proportion to the amounts in respect of which the parties may, after the inquiry has been completed, be found to have succeeded and failed respectively.

That is the decree which their Lordships will humbly advise Her Majesty to make in lieu of the decree now appealed from which will be discharged.

As regards the costs of this appeal, in which the rule of proportion observed in India does not prevail, their Lordships consider the success of the defendant to be so minute in proportion to the whole controversy that it ought not to weigh on the question of costs. The mesne profits of Nyadiar constitute the only point of principle on which the respondent has succeeded. Nyadiar is valued at Rs. 68 and a fraction, and the time of excessive mesne profits is less than 4½ years; so there is little over Rs. 300 in question. On all the important points the respondent is held to be wrong. He must pay the costs.

Appeal allowed; decree varied.

Solicitors for the appellant: Messrs. *Withers, Pollock & Crow.*
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

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[971] PRIVY COUNCIL.

PRESENT:

Lord Davey, Lord Robertson, Sir Richard Couch, Sir Henry De Villiers and Sir Ford North.

[*On appeal from the High Court at Fort William in Bengal.*]

LUCHMI KOER (*Plaintiff*) v. ROGHU NATH DAS (*Defendant*).
[10th May and 19th June, 1900.]

Hindu Law—Marriage—Evidence of marriage—Inferences and probabilities weighed against direct testimony.

Upon a widow's claim for maintenance the question was whether the relation between her and a person, deceased many years before her suit, whom she alleged to have been her husband, had been the relation of marriage or of concubinage. The decision of this question, one way or the other, rested on considerations whether the substantial testimony of witnesses, who gave their testimony to the fact of the marriage in their presence was, or was not, outweighed and negatived in judicial estimation by the antecedent and inherent improbability that such a marriage, under the circumstances of the parties alleged to have entered into it, would have taken place. The oral evidence was, however, corroborated by inferences drawn from several facts well established. The present suit was defended by the successor in estate of the deceased, and it was common ground between this defendant and the plaintiff that there had been co-habitation between the deceased and the latter. This narrowed the effect of the condition and circumstances of the deceased at the time of the alleged marriage upon the question whether it was a fact. The ordinary criteria afforded by conduct contributed but little aid to remove doubt.

In the result, the conclusion of the Judicial Committee was that the direct oral testimony had not been overborne; but should prevail against the improbability presented by the case that such a marriage should have taken place. The affirmative of it was maintained, and the widow's claim allowed.

APPEAL from a decree (10th September 1895) of the High Court reversing a decree (19th September 1892) of the Subordinate Judge of Tirhut.

The plaintiff, now appellant, whose mother was Gopi Bai, a Baid practising medicine at Mozafferpur, claimed by her plaint (22nd November 1890) as sole widow of one described as Raja Ram Das, a zemindar, calling himself a mohant, to be entitled after his death to a suitable allowance for her maintenance, charged on the estate which had belonged to the deceased, who died on the 27th November 1878. The defendant, respondent, who had succeeded to that estate in consequence of the provisions of the will of the late Raja Ram Das (of which probate was decreed to [972] issue on the 21st February 1851), denied that the plaintiff had been the married wife of the deceased.

On the testimony of witnesses to the ceremony, whom the Court considered trustworthy, the Subordinate Judge of Tirhut found that the alleged marriage had taken place in 1878, some months before the death of the husband. The decision was that the plaintiff as the widow was entitled to be maintained out of the estate at a suitable rate, which the Judge fixed at Rs. 750 a month, a sum which on the present appeal was reduced to Rs. 500.

The High Court (PRINSEP and GHOSE, JJ.), on the defendant's appeal, reversed the decree, and dismissed the suit on the ground that the plaintiff had failed to prove that she was the widow of Raja Ram Das.

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PRINSEP, J., summarized his judgment as follows, after examining the facts in evidence in detail :—

"I find myself unable to agree with the Subordinate Judge that the plaintiff is the widow of the deceased Raja Ram Das, and as such entitled to maintenance. The plaintiff's case really depends upon the evidence of the witnesses to the marriage. This evidence is by no means satisfactory for reasons already stated, and it is completely negatived by the conduct of the parties both before and after the alleged marriage. The visit of Gopi Bai at that time seems to have been for medical attendance on the mohant, and it would seem that advantage was taken of his dissolute and immoral habits to entangle him into living with the plaintiff. Her age was unmistakeably not that stated by her, seven or eight years, and in this respect we agree with the Subordinate Judge ; and I here draw attention to the fact that the condition under which the mohant is said to have married this girl, *viz.*, that he should acknowledge and appoint her brother as his successor in the mohantship, which was set up in the proceedings relating to the application for probate, is no part of the evidence in the present case. Moreover, the conduct of the mohant himself and the absence of such evidence as might be expected, that the marriage was announced either by him or by persons connected with his estate at Jaintpore when Gopi Bai and her family came to Jaintpore, and indeed was even openly asserted until the application for probate of the deceased mohant made on behalf of defendant, tends to throw discredit on the evidence of the witnesses to the marriage. Lastly, the conduct of the defendant since that time does not prove any admission of the plaintiff's status as widow."

GHOSE, J., also, after reviewing the evidence at length, concluded on a general balance of the improbabilities of such a **[973]** marriage having taken place, against the oral evidence, affirming it, that it would not be safe to rely upon the latter.

On this appeal,

1900, *May* 10. Mr. *C. W. Arathoon* appeared for the appellant.

Mr. *G. E. A. Ross*, for the respondent.

Cur. adv. vult.

JUDGMENT.

1900, *June* 19. Their Lordships' judgment was delivered by

LORD ROBERTSON.—The question raised by this appeal is whether the appellant was the wife and is now the widow of Raja Ram Das, who died on 27th November 1878. The suit was initiated by the appellant on 22nd November 1890 in the Court of the Subordinate Judge of Tirhut. The plaint and the written statement of the respondent, who, being heir of the deceased, appeared as defendant, involved other questions on which issue was joined ; but these it is now unnecessary to rehearse. Many witnesses were examined and many exhibits were filed. On 19th September 1892, the Subordinate Judge of Tirhut found that the plaintiff was the lawfully married wife of Raja Ram Das and is now his widow, and he pronounced a decree for maintenance at the rate of Rs. 750 a month. An appeal having been taken to the High Court of Judicature at Fort William in Bengal, that Court on 10th September 1895 set aside the Subordinate Judge's decree and dismissed the suit with costs. The present appeal is brought from that judgment of the High Court.

Raja Ram Das was zemindar of Jaintpore and a person of considerable wealth and position. He called himself mohant but he was not in

fact a mohant. Prior to the disputed period he was unmarried, but he was free to marry; he was greatly addicted to women, and he died, under thirty years of age, of diseases induced by his excesses. At the time of the alleged marriage, which was seven months before his death, he was suffering from those ailments.

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Of the personal facts relating to the appellant, it is difficult to say anything that is quite certain. She and her mother, for a purpose collateral to the present issue, have thought well to represent her as of the tender age of seven or eight at the time of her marriage; but it may be assumed that she was in fact older, [974] and had attained puberty. Her father is a most shadowy figure in the evidence, and his identity is not certainly ascertained. Her mother's part in these proceedings is much more prominent. The respondent suggests that she was an adventuress; and both she and her daughter are, to say the least, not uniformly truthful even in matters dangerously near the essence of their claim; and they are persons whose own statements must be received with caution and whose case it is necessary to test with vigilance. At the time of the alleged marriage, Gopi Bai, the mother, was practising medicine; and, contrary to her own statement, she does not seem to have withheld the benefits of her skill from either sex. She was a Bairagi, as was also the Raja, and the Judge of the High Court, who has formed the most adverse opinion of the appellant's case, considers that Gopi Bai attended the Raja professionally and "took advantage of his dissolute and immoral habits to entangle him into living with the plaintiff."

This observation may well introduce what is the central fact in the case, a fact which it is necessary to keep steadily in mind throughout the examination of the evidence, and which narrows the true scope of the controversy. It is common ground between the parties that Raja Ram Das and the appellant lived together for the last seven months of his life; and the only question is whether this took place on the footing of marriage or of concubinage. Had the fact been otherwise, the inherent improbabilities of the plaintiff's case arising from the alleged age of the bride and the health of the bridegroom would have been extremely difficult to overcome. But, if these two persons, whatever her age and whatever his health, did in fact cohabit during the period in controversy, objections have no relevancy which strike no more at the theory of marriage than at the theory of concubinage but really at facts common to both. Accordingly, so far as the appellant's age is concerned, the true inference is not that the story of the marriage must be rejected but only that she was older than she allows, and that the credibility of herself and her witnesses is to that extent affected. Again, the surprise and disgust excited by Gopi Bai having given her daughter to a person in the Raja's condition of health arise equally on either theory, and have scarcely any influence in the election between the two.

[975] The case of the appellant then, as presented in evidence, is that she was married to the Raja Ram Das at Benares on a day early in May 1878. The long interval between the alleged marriage and the trial of the issue must be allowed for in considering the evidence of the witnesses examined. It does not, however, give rise to any just suspicion that the appellant's claim is an afterthought; for, immediately after the death of Raja Ram Das, the appellant judicially asserted herself as his widow, and she received maintenance out of his estate from his death down to the dispute which led to the present litigation. These points will be hereafter more fully examined.

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The appellant has submitted to their Lordships' consideration the evidence of eleven witnesses who assert that they were present at the marriage ceremony, and two who assert that they were present at the procession immediately preceding but not at the ceremony itself. The marriage rites to which the witnesses depose were appropriate to the fact that both parties were Bairagis. The body of evidence thus presented is so substantial that it is difficult to disregard it, unless analysis shows its quality to render it unreliable. The respondent has boldly faced this difficulty and asked their Lordships to follow the High Court in entirely rejecting it. It is to be observed, however, that neither of the learned Judges of the High Court has presented any destructive criticism of that evidence, founded on inherent defects; the conclusion of both is rested on the antecedent improbability of such a marriage and on the subsequent events of the case. Their Lordships have had the benefit of a close and careful examination of the evidence by the respondent's counsel and they are unable to find adequate grounds for believing that witnesses who are not only numerous but of various social positions have been suborned, and the respectability of some of them is vouched for by the learned Judges in the High Court. But further, all the witnesses were cross-examined, and the cross-examination has in no instance shaken the evidence, while in several cases it has brought out circumstantial and striking additions to its verisimilitude. There is no monotony in the evidence, while at the same time there are no contradictions; each witness speaks from his own point of view and some saw more and some less.

[976] On one point indeed the respondent has succeeded in raising the suspicion that some of the witnesses have spoken rather on the suggestion of the appellant's mother than from their own knowledge, and that is the appellant's age. It seems certain that at the time of the marriage the plaintiff was not so young as 7 or 8, and many of the witnesses give that as her age. But even assuming that those witnesses have too facilely accepted the appellant's story as to her age, their Lordships do not regard this as an adequate ground for rejecting the whole of their evidence as tutored. The age of the bride (whose dress precluded any accurate inferences from her face or figure) was not a matter on which they had personal knowledge or could do otherwise than rely on information, whereas the matter which they came to attest was the *factum proprium* that at Benares on a certain day they saw certain things done.

On the whole, the solid body of direct testimony presented by the appellant as to the fact of marriage can only be rebutted by the most cogent contrary inferences from the circumstances of the parties. Before ascertaining whether such exists it is well to gather together those proved facts which corroborate the affirmative evidence.

Of these, one is supplied by the respondent. In cross-examination the appellant seems to have been challenged by the respondent to say whether any persons were with the Raja when he was at Benares on the occasion of his marriage, and she named two persons, both of whom were afterwards put into the witness box by the respondent. Both these men were very likely to have been with the Raja on the occasion in question, if he himself was there, for they were close attendants and confidants, as their own depositions show. It was manifestly the duty of the respondent, if the appellant had spoken falsely on this crucial test of her story which he himself had selected, to disprove her statement by

these witnesses; yet neither was asked a question on the subject. The appellant may fairly claim, and the Subordinate Judge has held, that her statement that they were present is to be accepted as true.

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27 C. 971 (P.C.) = 27 I.A. 142 = 4 C.W.N. 685 = 7 Sar. P.C.J. 734.

The next fact in the order of time is one which has substantial importance and has been treated much too lightly in the [977] High Court. After the death of the Raja, the executor under his will applied for (and ultimately obtained) probate. But on 18th January 1879, within two months of his death, the appellant filed a caveat in the Probate Court designing herself as widow of the Raja, and she followed this up by a written statement in which her marriage was specifically alleged. It is unnecessary to consider the main contention which she maintained on that occasion, for the Judge held that even assuming everything she said to be true no valid objection was stated to the prayer of the executor for probate. The point is not merely that the appellant immediately showed herself in the character of widow, but that she thus came forward, not asserting her marriage (as if assertion were needed), but assuming it, in order to enforce what she alleged to have been a condition of her marriage, *viz.*, that her brother should be adopted as son of the Raja.

This tone of the appellant's pleading, implying that the marriage itself was undisputed, is in harmony with certain admissions by the respondent, who it is true was only a boy at the time of the Raja's death, but who says that five or six months before that event (that is to say just after the alleged marriage) he had heard the appellant and her mother say that the appellant was married to the Raja. The position taken by the appellant in the probate proceedings throws a strong light also on the subsequent payment to her of maintenance, for there could be no dubiety as to the footing on which she received it. These payments were made regularly until the respondent got into pecuniary embarrassment and there are extent tankhas in which the allowance is expressly said to be on account of maintenance. The respondent has sought to assimilate these payments to payments to certain prostitutes who had been the mistresses of the Raja, on the ground that in a statement of liabilites the allowance of the appellant appears in juxtaposition to those doles. But even in this juxtaposition the appellant's name is distinguished by the honourable prefix of Mussummat, while the amount of her allowance is in marked contrast to those of the others. Among the minor corroborations of the appellant's claim she points to the fact that in certain letters to her the respondent [978] addressed her as Bhouji (brother's wife) and although the amatory tone of the letters precludes the reader from taking everything literally, this is to be noted along with the other facts of the appellant's case. The circumstances now noticed, derived from the period after the Raja's death, furnish strong corroboration of the direct evidence of the fact of marriage. (Their Lordships do not rely on some words uttered by the Raja himself for they may possibly have been intended merely as an evasion of an unwelcome inquiry.)

Against this evidence the respondent has mainly relied on the general improbabilities arising from the alleged age of the appellant and the health of the Raja, on the inferiority of her position, on the absence of religious motive for the marriage, and on a variety of other objections such as the unlikelihood of a personage like the Raja going to Benares for his marriage without a retinue. Several of these matters have been already touched on; and there is this further general observation to be made,—that the

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disorders of the Raja's life make the ordinary criteria of conduct misleading guides to the truth of what he allowed himself to do or was induced to do. It may very well be that Gopi Bai had established an influence over this invalid and voluptuary to which her medical skill contributed, and that the Raja did not court publicity for a marriage upon which reflections might be made.

The respondent however has advanced a few specific facts which, so far as they go, bear directly against the marriage. The Raja had made his will before the alleged marriage and in it of course there was no provision for the appellant. When he did make provision for her, it was by furnishing the larger part (if not the whole) of the price of a property, which was conveyed by the seller to the appellant. Now the purchase and the terms of the conveyance were arranged by two persons, of whom one was a servant of the Raja and the other a servant of Gopi Bai, and the respondent's point is that the appellant is not described as the Raja's wife but as if she were unmarried. *Prima facie* this is an argument against the appellant; but it is not of a very conclusive character, and the respondent did not bring home either to the appellant or Gopi Rai or to the Raja any [979] knowledge of the terms of the conveyance. As regards the testamentary intentions of the Raja towards the appellant, it may very well have been that he relied, as he justly might, on the provision of the law to secure this lady maintenance, over and above the property conveyed by this deed of sale.

On a full consideration of the whole case their Lordships deemed the marriage to be established. On the question of the amount of maintenance their Lordships agree with the High Court in fixing Rs. 500 a month as the sum which the appellant ought to receive. They will humbly advise Her Majesty that the judgment of the High Court should be reversed, and that of the Subordinate Judge should be restored with this variation that the amount of maintenance be Rs. 500 a month instead of Rs. 750 a month, and that the respondent pay the costs in the High Court and proportionate costs in the Court of the Subordinate Judge. The respondent will also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Watkins & Lempriere.*
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

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27 C. 979 = 4 C.W.N. 827.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

GOLAPDY SHEIKH AND OTHERS (*Petitioners*) *v.* QUEEN-EMPRESS (*Opposite party*).* [11th May, 1900.]

Magistrate, Jurisdiction of—Reference of case for trial of offence by Subordinate Court—Power of District Magistrate to issue warrants for arrest of other persons concerned in that offence.

Where cognizance was taken of an offence on a police report and the case was made over to a Subordinate Magistrate, *Held* that, so long as the case connected with that offence remained with the Subordinate Magistrate, no other Magistrate

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* Criminal Revision, No. 298 of 1900, made against the order passed by H. F. Samman, Esq., District Magistrate of Bogra, dated the 12th of August 1899.

was competent to deal with it, and that applications for warrants against other persons concerned in that offence should be made to the Magistrate before whom the case was, and to no other Magistrate. 1900 MAY 11.

[R., 30 C. 449; 32 C. 783 (791) = 2 Cr. L.J. 524 = 9 C.W.N. 810; 3 C.L.J. 87 (89) = 3 Cr. L.J. 209; D., 39 C. 119 = 13 Cr. L.J. 433 = 15 Ind. Cas. 65.] CRIMINAL REVISION. 27 C. 979 = 4 C.W.N. 827.

[980] ON an investigation made by the police in respect of looting a house, one person, Jagira, who could alone be apprehended, was sent in for trial and the case was made over to a Subordinate Magistrate, who discharged Jagira. The other persons who were charged in the case could not be arrested, and were not placed on their trial. A representation was made by the District Superintendent of Police to the District Magistrate of Bogra who ordered warrants to issue for the arrest of the other persons in order that they might be tried under ss. 143 and 147 of the Penal Code.

Mr. *P. L. Roy* (with him Babu *Kritanto Kumar Bose*), for the petitioners.

JUDGMENT.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—In this case it appears that, on an investigation made by the police in respect of what may be termed looting a house, one person who could alone be apprehended, Jagira, was sent in for trial and the case was made over to a Subordinate Magistrate who discharged Jagira. The others who were charged in that case could not be arrested and were, therefore, not placed on their trial. On a representation to the District Magistrate by the District Superintendent of Police, he has thought proper to issue warrants against these other persons in order that they might also be tried. The jurisdiction of the District Magistrate to make this order has been questioned on the rule granted by us. Cognizance was taken of the offence on the police report and the case was made over to a Subordinate Magistrate, and so long as the case connected with that offence remained with the Subordinate Magistrate no other Magistrate was competent to deal with it; the case has never been withdrawn by the District Magistrate for trial by himself, so that he could properly pass an order directing proceedings to be taken against other persons. Application for the warrants against other persons accused of that offence should have been made to the Magistrate before whom the case was and to no other Magistrate. The District Magistrate in his explanation in answer to this rule, seems to think that the case only as against Jagira was made over to the Subordinate Magistrate for trial. But that is not so. The case regarding the offence charged alleged to have been committed as shown in the [981] police report was before that Magistrate, and he was alone competent, on the police report, to proceed against other persons concerned in that offence if he thought proper to do so; and no further orders from the District Magistrate were necessary or indeed could be passed so long as the case remained in his Court. The orders of the District Magistrate of the 12th August last are set aside as without jurisdiction, the rule being made absolute.

D. S. *Rule made absolute.*

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CRIMINAL REVISION.

27 C. 981.

27 C. 981.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

MOHESH SOWAR AND OTHERS (*2nd Party, Petitioners*) *v.* NARAIN BAG (*1st Party, Opposite Party*).* [5th June, 1900.]

Possession, Order of Criminal Court as to—Order instituting proceedings under s. 145 of the Code of Criminal Procedure (Act V of 1898)—Contents of such order—Irregularity in order, making proceedings without jurisdiction.

Unless a Magistrate complies strictly with the terms of s. 145 of the Code of Criminal Procedure by stating in his written order all the particulars necessary to enable him to act under that section, his proceedings are without jurisdiction. It is not sufficient that the Magistrate should have before him a police report and that he should have given orders thereon that a written order be drawn up within the terms of s. 145. It is his duty to draw up, or have drawn up, an order which in all respects satisfies the requirements of the law. It is absolutely necessary that the written order should be correct and complete in its terms.

[**Diss.**, 7 O.C. 334 ; **F.**, 25 A. 537 (539) = 23 A.W.N. 102 ; 27 A. 296 (298) = 24 A.W.N. 234 ; **R.**, 32 C. 771 (774) = 9 C.W.N. 621 = 2 Cr. L.J. 342 ; 33 C. 852 = 2 C.L.J. 259 (262) = 9 C.W.N. 1065 ; 6 Cr. L.J. 113 = 7 P.R. 1907 (Cr.) = 71 P.L.R. 1908 = 24 P.W.R. 1907 (Cr.) ; 36 M. 275 = 13 Cr. L.J. 753 = 17 Ind. Cas. 65 = 23 M.L.J. 499 (510) = 12 M.L.T. 439 = (1912) M.W.N. 1154 (1162) ; **D.**, 7 C.W.N. 599 (600).]

IN this case at the time of the *aus* paddy getting ripe the first party complained to the police that the second party would cut their (the first party's) crops. Thereupon proceedings under s. 145 of the Criminal Procedure Code were instituted, but owing to there being no certainty as to what was in dispute, the case was struck off, the police reaping the paddy. A further report was called for, and on the 11th of January 1900, fresh proceedings under s. 145 were instituted by the Deputy Magistrate of Serampore.

[982] The order was as follows :—

"Whereas it appears that there is a likelihood of a breach of the peace in respect of eight bighas three cottas in ten plots of land in village Tegri P. S. Haripal, in consequence of Narain Bag on the one hand and Mohesh Sowar, Brojo Dass and Gossair Das on the other, each claiming to be in possession, I order the parties to appear before me on January 22nd at Tarkeswar at 11 A.M., in person or by pleader, and put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute and produce their witnesses on that day."

On the 7th of February the Deputy Magistrate ordered the first party to remain in possession of the disputed land.

On the 20th of April the second party obtained a rule from the High Court calling on the District Magistrate to show cause why the order under s. 145 of the Code of Criminal Procedure should not be set aside on the ground that in his order purporting to be under sub-s. (1) of s. 145 instituting such proceedings, the Magistrate had not set out the grounds upon which he was satisfied that it was necessary for him to take such action.

Mr. *P. L. Roy* (with him Babu *Agore Nath Seal*), for the petitioners.
Mr. *Dunne* (with him Babu *Dasarathi Sanyal*), for the opposite party.

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* Criminal Revision No. 272 of 1900, made against the order passed by H.P. Duval, Esq., Deputy Magistrate of Serampur, dated the 7th of February 1900.

JUDGMENT.

1900 JUNE 5. — CRIMINAL REVISION. — 27 C. 981.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—Section 145, Code of Criminal Procedure, requires that in order to institute proceedings thereunder, the Magistrate shall make an order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists concerning land, etc., and it also requires that, before he makes such an order, the Magistrate should be so satisfied from a police report or other information. The matter has been so frequently before this Court in reported cases that we are much surprised to find that errors are still constantly committed which have the effect of rendering null and void proceedings taken which have occupied Magistrates for several days, and have otherwise been conducted with care. It has been frequently held by this Court in reported cases that unless a Magistrate complies strictly with the terms of s. 145 by stating in his written order all the particulars necessary to enable him to act under that section, his proceedings are without **[983]** jurisdiction. It is not sufficient, as contended by the learned counsel before us, that the Magistrate should have before him a police report of this description, and that he should have given orders thereon that a written order be drawn up within the terms of s. 145. It is his duty to draw up or have drawn up an order which in all respects satisfies the requirements of the law. It is absolutely necessary, as has been held by this Court, that the written order should be correct and complete in its terms. The proceedings must, therefore, be set aside as without jurisdiction.

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27 C. 983=4 C.W.N. 795.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

SHEO BHAJAN SINGH AND OTHERS (*Petitioners*) *v.* S. A. MOSAWI (*Opposite Party*).* [5th June, 1900.]

Recognizance to keep peace—Conviction under s. 143 *of the Penal Code* (*Act XLV of* 1860)—*Code of Criminal Procedure* (*Act V of* 1898), s. 106.

An offence under s. 143 of the Penal Code is not one of the offences specified in s. 106 of the Code of Criminal Procedure which would justify an order directing a person or persons to furnish security to keep the peace.

There may be findings in the case which would justify such an order if such findings can be brought within the terms of s. 106. *Jib Lal Gir* v. *Jogmohun Gir* (1) referred to.

Where the accused were convicted under s. 143 of the Penal Code and ordered under s. 106 of the Code of Criminal Procedure to furnish security to keep the peace, and it was alleged that the facts as proved showed that the accused came in a body, some of whom were armed with *lathis* and some of whom used threats and did other acts, showing an evident intention to commit breaches of the peace. *Held*, that there should have been an express finding to that effect; that if the accused or any of them acted in such a manner, they should have been convicted of criminal intimidation or other offence which would enable the Magistrate to bind them over to keep the peace; and that the order under s. 106 should be set aside.

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* Criminal Revision, No. 256 of 1900, made against the order passed by Mohini Mohun Chakravarti, Sub-Divisional Magistrate of Jehanabad, dated 8th March 1900.

(1) 26 C. 576.

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[F., 7 C.L.J. 172 ; R., 31 C. 419 (420) ; 8 C.W.N. 517 (519) ; 9 O.C. 381 (384) ; U. B. R. (1904) 1st Qr. Penal Code, p. 4.]

In this case the Circle Officer of the 9 annas Tikari Court of Wards at Jahanabad camped at Ghasi, and, having called the ryots of the neighbouring villages, including the three accused, he found differences between their statements of rents and those [984] entered in the local *putwari* papers. He thereupon sent for the duplicates from the *Sadar* office of Jahanabad and told the royts to pay up according to the *Sadar* papers, owing to which larger amounts were realized from the accused and others. In the evening the Circle Officer retired to his tent; shortly afterwards he heard loud *hullahs* and noises outside, his peons informed him that a large crowd had assembled outside and were using threatening words as "*maro*" and "*khima jala do.*" The Circle Officer ordered his men not to say any thing likely to provoke a breach of the peace and at once wrote a letter to the Sub-Divisional Magistrate and sent it by a *sowar*. Shortly afterwards the crowd dispersed.

The accused were convicted on the 8th of March 1900 by the Sub-Divisional Magistrate of Jehanabad under s. 143 of the Penal Code and were also ordered under s. 106 of the Code of Criminal Procedure to furnish security to keep the peace.

Babu *Luchmi Narain Singh*, for the petitioners.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown.

JUDGMENT.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—The Magistrate, in convicting the petitioners under s. 143, Penal Code, added to the sentence an order under s. 106, Code of Criminal Procedure, directing them to furnish security to keep the peace.

Now, an offence under s. 143, Penal Code, is not one of the offences specified in s. 106, which would justify such an order. As has been pointed out in the case of *Jib Lal Gir* v. *Jogmohun Gir* (1) there may be findings in the case which would justify such an order if such findings can be brought within the terms of s. 106, but in the present case there are no such findings at all. The Magistrate in his explanation attempts to justify his order by stating that "the facts as proved showed that the accused came in a body, some of whom were armed with *lathis* and some of whom used threats and did other [985] acts intending evidently to commit breaches of peace." We can find no express finding to this effect, and we would observe further that if the accused or any of them acted in this manner, they should have been convicted of criminal intimidation or other offence which might enable the Magistrate to bind them over to keep the peace. We are inclined to think that difficulties arise in cases such as the present because Magistrates, instead of trying an accused for the offence constituted by all the acts proved, prefer to charge and try him for an offence under s. 143, Penal Code, because such a trial can be held under the summary procedure; and we take this opportunity of expressing our strong disapproval of such a course. The order under s. 106, Code of Criminal Procedure, is accordingly set aside.

D. S.

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(1) 26 C. 576.

27 C. 985=5 C.W.N. 131.

1900
JUNE 15.

CRIMINAL REVISION.

27 C. 985=5 C.W.N. 131.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

DURGA DAS RAKHIT AND ANOTHER (*Petitioners*) *v.* UMESH CHANDRA SEN (*Opposite Party*).* [15th June, 1900.]

Complaint—Institution of complaint and necessary preliminaries—Charge of furnishing false information in Land Acquisition Proceedings—Omission to refer to particular false statement on which accusation made—Penal Code (*Act XLV of* 1860), s. 177—*Land Acquisition Act* (*I of* 1894), ss. 9 *and* 10—*Summons case—Non-attendance on service of summons—Appearance of accused by mukhtar—Contempt of Court—Code of Criminal Procedure* (*Act V of* 1898), s. 205—*Penal Code* (*Act XLV of* 1860), s. 174.

A Magistrate issued process for the attendance of the accused on the complaint of the Land Acquisition Deputy Collector for having given false information within the terms of s. 177 of the Penal Code and s. 10 of the Land Acquisition Act in certain written statements that they had made to the Collector. The complaint was that the written statements were false. The documents, however, contained more than one statement of fact; neither in the complaint made by the Deputy Collector nor in his examination by the Magistrate was any reference made to any particular statement made by either of the accused as being a false statement, nor had the Deputy Collector put in the written statements, upon which he desired to proceed, either with his written complaint or at the time of his examination by the Magistrate.

[986] *Held*, that the complaint was bad and the case should not be allowed to proceed in its present form. The Magistrate was bound to require from the complainant the written statements on which the proceedings were founded, and also to ascertain from him the particular statement or statements on which the accusation was made.

In a summons case on the day fixed for trial an appearance was made on behalf of an accused person by his mukhtar who asked the Magistrate under s. 205 of the Code of Criminal Procedure to dispense with the personal attendance of the accused. The Magistrate, however, regarding the non-attendance of the accused as a contempt of Court, called upon him to show cause why he should not be prosecuted under s. 174 of the Penal Code for non-attendance on service of summons.

Held, that the accused did make an appearance, though not a personal appearance, on service of summons, but that he did not personally attend should not under the circumstances have been regarded as an offence under s. 174 of the Penal Code.

A COMPLAINT was made by the Land Acquisition Deputy Collector against the two accused, Durga Das Rakhit, the lessor, and Abhoy Charan Dey, the lessee, claiming to hold a portion of the land taken up under the Land Acquisition Act, charging them with having given false information within the terms of s. 177 of the Penal Code and s. 10 of the Land Acquisition Act in certain written statements which they made to the Collector in response to a call from him under s. 9 of the latter Act. The complaint was that the written statements put in were false. The documents, however, contained more than one statement of fact. Neither in the complaint made by the Deputy Collector nor in his examination by the Magistrate was any reference made to any particular statement made by either of the accused as being a false statement, and the Deputy Collector had not put in written statements upon which he desired to proceed either with his written complaint or at the time of his examination

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* Criminal Revision, No. 331 of 1900, made against the order passed by H. F. Samman, Esq., District Magistrate of Midnapur, dated the 18th of April 1900.

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by the Magistrate. The Magistrate issued processes for the attendance of the accused. On the day fixed for trial, the case being a summons case, Abhoy Charan Dey appeared and appearance was made on behalf of Durga Das Rakhit by his mukhtar, who asked the Magistrate under s. 205 of the Code of Criminal Procedure to dispense with the personal attendance of the accused. Abhoy Charan Dey asked for and obtained an order from the Magistrate excusing his further personal attendance and allowing him to appear [987] by a mukhtar. The Magistrate, however, refused to allow the application made on behalf of Durga Das Rakhit, and, regarding his non-attendance as a contempt of Court, called upon him to show cause why he should not be prosecuted under s. 174 of the Penal Code for non-attendance on service of summons.

Mr. *Jackson* (with him Babu *Atulya Charan Bose*), for the petitioners.

Babu *Srish Chandra Chowdhry*, for the Crown.

JUDGMENT.

The judgment of the Court (PRINSEP and HANDLEY, JJ.), was delivered by

PRINSEP, J.—This matter has already once been before this Court under circumstances somewhat similar to those now before us. The petitioners were then being prosecuted for perjury and forgery, alleged to have been committed in proceedings taken before the Deputy Collector under the Land Acquisition Act. And for reasons stated by the Judges of the Criminal Bench of this Court, on a rule granted the proceedings were quashed as premature and without jurisdiction. The Collector, finding that the bar has been removed because the Civil Court has, in his opinion, finally decided the matter under the Land Acquisition Act, has renewed his complaint before the Magistrate and he has put the offence under s. 177, Indian Penal Code, which is declared to be applicable to such proceedings by s. 10 of the Land Acquisition Act.

The complaint was made against two persons, Durga Das Rakhit, the lessor, and Abhoy Charan Dey, the lessee, claiming to hold a portion of the land taken up under the Act, and they have been accused of having given false information within the terms of s. 177, Indian Penal Code, and s. 10, Land Acquisition Act, in certain written statements that they made to the Collector in response to a call from him under s. 9. We may first of all observe that neither in the complaint made by the Deputy Collector nor in his examination by the Magistrate has any reference been made to any particular statement made by either of the accused as being a false statement. The complaint is that the written statements put in were false. It is clear that those documents contained more than one statement of fact. We also [988] find that the Deputy Collector had not put in the written statements upon which the Collector desired to proceed either with his written complaint or at the time of his examination by the Magistrate. The Magistrate, therefore, had not before him the facts constituting the offence regarding which he was called upon to act, and notwithstanding this, he issued processes for the attendance of the accused.

Now in this respect we think that the Magistrate has acted without proper discretion. He was bound to require from the complainant the written statements on which the proceedings were founded, and also to ascertain from the complainant the particular statement or statements on which the accusation was made.

On the day fixed for trial, the case being a summons case, Abhoy Charan Dey appeared and appearance was made on behalf of Durga Das Rakhit by his mukhtar who asked the Magistrate under s. 205 to dispense with the personal attendance of that accused. At the same time Abhoy Charan Dey, who did personally attend, asked for and obtained an order from the Magistrate excusing his further personal attendance and allowing him to appear by a mukhtar. The Magistrate, however, refused to allow the application made on behalf of Durga Das Rakhit, and he regarded his non-attendance as a contempt of Court, misapplying that term as it is generally used. He accordingly called upon Durga Das Rakhit to shew cause why he should not be prosecuted under s. 174, Indian Penal Code, for non-attendance on service of summons, and the Magistrate has, in his explanation, expressed himself strongly regarding the conduct of Durga Das Rakhit in this respect.

We think that the Magistrate has taken an entirely mistaken view of this part of the case. He seems to have been animated by some feeling that Durga Das Rakhit was acting contemptuously towards the Court. There was no reason for this supposition. The Magistrate should rather have told the mukhtar that he required the personal attendance of Durga Das Rakhit on some fixed day, or that if he did not choose to appear he would issue a warrant of arrest. That in our opinion would have answered sufficiently. [989] The Magistrate, however, appears to have regarded it as an aggravation of the offence that Durga Das Rakhit should instead of attending his Court have proceeded to Calcutta in order to apply to the High Court, and that he also applied to the District Magistrate for bail as well as for an order directing the Subordinate Magistrate to dispense with the personal attendance of the accused. He considers that by making this application Durga Das Rakhit was "doubly guilty of contempt of Court." Throughout, the Magistrate has failed to appreciate what he was entitled to expect from Durga Das Rakhit. There was no possible reason why he should not proceed to the High Court to make an application regarding this case, and he was also within his rights in making his application to the District Magistrate. He did make an appearance, though not a personal appearance, on service of summons, but that he did not personally attend, should not under the circumstances have been regarded as an offence under s. 174. We think, therefore, that the proceedings under s. 174, Indian Penal Code, against Durga Das Rakhit were misconceived and that they should cease.

In regard to the prosecution under s. 177, we are of opinion that, as now taken, the complaint is bad, and that the case should not be allowed to proceed in its present form. We are further of opinion that inasmuch as the proceedings are still before the High Court in respect of Abhoy Charan Dey, no prosecution should be taken in the Magistrate's Court, until at least the final orders of the High Court shall have been obtained. No doubt there was a reference made by the Deputy Collector to the District Judge in respect of the objection to the award made by Durga Das Rakhit, and we understand that, in consequence of his absence, that reference has been summarily dismissed. But the matter still remains in regard to Abhoy Charan Dey whose case the Deputy Collector refused to refer. It is difficult to understand how the cases of these two persons claiming to be lessor and lessee can be distinguished, and on this ground and because there are proceedings now before the High Court, we think that there should be no proceedings at all against either Abhoy Charan Dey or Durga Das Rakhit until orders of the High Court shall have been

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obtained. We would again point out that in the [990] Magistrate's Court the complaint was made against these two jointly. But any offence committed by each is a distinct and separate offence and should be tried separately. The rule is, therefore, made absolute.

D. S.

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27 C. 990 = 5 C.W.N. 31.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

RAHIMUDDI AND OTHERS (*Petitioners*) *v.* ASGAR ALI (*Opposite Party*).* [6th June, 1900.]

Charge—Alteration of charge—Conviction of rioting with the common object of theft—Finding by appellate Court of different common object—Legality of conviction on such finding—Penal Code (Act XLV of 1860), *ss.* 147 *and* 379—*Code of Criminal Procedure (Act V of* 1898), *s.* 423.

The accused were convicted by a Magistrate of theft of mangoes and also of rioting, the common object of the unlawful assembly being the forcibly taking away of mangoes belonging to the complainant. On appeal the Sessions Judge not only found that the common object was not the taking of the mangoes but that the dispute between the parties was as to certain land. He however dismissed the appeal and confirmed the conviction. *Held*, that as the accused were convicted on a different finding of fact from that to which they were called upon to plead and to defend themselves at the trial they were entitled to an acquittal.

[R., 33 C. 295 = 2 C.L.J. 516 (523).]

IN this case it was alleged on behalf of the prosecution that the accused with several others forcibly plucked and took away mangoes from trees belonging to the complainant, and when the complainant resisted he was beaten by the accused and their party with *lathis*.

The accused were tried, and on the 7th of February 1900 were convicted by the Magistrate of Dacca under s. 379 of the Penal Code of the theft of the mangoes, and under s. 147 of the Penal Code of rioting, the common object of the assembly being the forcibly taking away of the mangoes, and were sentenced to rigorous imprisonment of three months each and to pay a fine of Rs. 20 each under s. 147 only.

On appeal the Sessions Judge of Dacca disbelieved the evidence relating to the taking of the mangoes, and found that the common object was not the taking of the mangoes but that the [991] parties were disputing with regard to certain land. He, however, on the 31st of March 1900, dismissed the appeal and confirmed the conviction and sentence.

Mr. *P. L. Roy* for the petitioners.

JUDGMENT.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINIEP, J.—The Magistrate has convicted the petitioners of theft of mangoes and also of rioting, the common object of the unlawful assembly being the forcible taking away of mangoes belonging to the complainant.

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* Criminal Revision No. 299 of 1900, made against the order passed by G. Gordon, Esq., Sessions Judge of Dacca, dated the 31st of March 1900.

In appeal the Sessions Judge has entirely disbelieved the evidence relating to the taking of the mangoes or that that was the common object of the unlawful assembly. He, however, finds (and about this there is no doubt) that a fight took place between the two parties, and on this he has endeavoured to ascertain from the evidence what the common object of the assembly was which caused this fight; and, so far as we understand his judgment, he has not only found that the cause was not the taking of the mangoes but that it was something else. The Sessions Judge has accordingly dismissed the appeal confirming the conviction and sentence, but on a different finding of fact from that to which the petitioners were called upon to plead and to defend themselves at the trial. The petitioners have accordingly been convicted by the appellate Court of an offence for which they have never been tried. They are consequently entitled to an acquittal. The result may be unfortunate, if the petitioners have broken the peace and caused bodily injuries to persons in a fight; but on the findings of the lower Court they cannot possibly be convicted. The sentences are accordingly set aside and the fine, if paid, must be refunded.

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27 C. 990 = 5 C.W.N. 31.

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27 C. 992 = 5 C.W.N. 32.

[992] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

BHAGIRATHI NAIK (*Petitioner*) v. GANGADHAR MAHANTY (*Opposite-party*).* [6th June, 1900.]

Cattle Trespass Act (1 of 1891), s. 22—Illegal seizure of cattle—Fine—Compensation.

A Magistrate is not competent under s. 22 of the Cattle Trespass Act, to pass any sentence of fine; he can only award compensation for the illegal seizure of cattle.

IN this case the accused, on the 2nd of March 1900, was found guilty under s. 22 of the Cattle Trespass Act by the Deputy Magistrate of Balasore, of having illegally impounded four cows belonging to the complainant, and directed to pay a fine of Rs. 10, and the costs of the case. Out of the fine complainant was to get Rs. 5 and accused to suffer a week's simple imprisonment in default of payment of the fine.

Babu *Provash Chunder Mitter*, for the petitioners.

JUDGMENT.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—The Magistrate, in a case under s. 22 of the Cattle Trespass Act, 1891, has fined the petitioner Rs. 10, and the costs of the case and he has directed that out of this sum Rs. 5 be paid to the complainant. He has also ordered that, in default of payment of the fine, the petitioner do suffer one week's simple imprisonment.

The order throughout is bad and not in accordance with the terms of s. 22 of the Cattle Trespass Act. The Magistrate is not competent under that law to pass any sentence of fine. He can only award compensation for an illegal seizure of cattle. In this view we must set aside the order

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* Criminal Revision, No. 313 of 1900, made against the order passed by Syed Abdul Malek, Deputy Magistrate of Balasore, dated the 2nd of March 1900.

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of fine, and direct that, in substitution thereof, the accused do pay the sum of Rs. 5 as compensation to the complainant, and do also pay the costs of the case. The order of imprisonment in default of payment of this fine is also illegal and must be set aside.

D. S.

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27 C. 993.

[993] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

KETABOI AND OTHERS (*Petitioners*) *v.* QUEEN-EMPRESS (*Opposite Party*).* [6th June, 1900.]

Security for good behaviour—Jurisdiction of Magistrate over person not residing within his jurisdiction—Reputation—Code of Criminal Procedure (Act V of 1898), s. 110.

It is only when a person within the limits of a Magistrate's jurisdiction, that is, who is residing within the limits of such jurisdiction, is found to be a person of the description given in s. 110 of the Code of Criminal Procedure, that the Magistrate can take action under that section, and it is not contemplated that the Magistrate in such a case should issue a warrant so as to pursue the person concerned into another jurisdiction.

Under the terms of s. 110 of the Criminal Procedure Code, the reputation which the person is found to have means the reputation of that person in the neighbourhood in which he resides.

[N.F., 36 M. 96=17 Ind. Cas. 413=23 M.L.J. 535=13 Cr. L.J. 781 ; F., 12 P.R. 1901 Cr.=91 P.L.R. 1901.]

IN this case a dacoity having been reported to have taken place within the District of Naraingunge, a Sub-Division of the District of Dacca, the Sub-Inspector of Naraingunge arrested the petitioners, who were inhabitants and residents of the village of Nalchar in the District of Tipperah, and sent them up in custody to the Sub-Divisional Magistrate of Naraingunge. On being brought up before the Magistrate he at once drew up a proceeding under s. 110 of the Code of Criminal Procedure, requiring the petitioners to show cause why they should not execute bonds and find sureties to be of good behaviour for three years.

The petitioners submitted that as they were residents of a different district, the Magistrate of Naraingunge had no jurisdiction to institute any proceeding against them under s. 110 of the Code. The Magistrate, however, overruled the objection, and on the 9th of January 1900 ordered the petitioners to furnish sureties for their good behaviour for three years and in default to undergo rigorous imprisonment for that period.

The material portion of the Magistrate's judgment was as follows :—

" One further question remains for me to consider and that is raised in the *jawab* of the defendants. It is held that I have no jurisdiction. The words [994] of the section are :—' Whenever a Sub-Divisional Magistrate receives information that any person within the local limits of his jurisdiction is by habit a robber, house-breaker or thief . . such Magistrate may, &c.'

" These words may of course be read to include only persons residing within the Magistrate's jurisdiction, but I can find nothing in the

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* Criminal Revision, No. 321 of 1900, made against the order passed by S. J. Douglas, Esq., Sessions Judge of Dacca, dated the 26th of February 1900.

Code to show that the words should be restricted to this use. The words can equally well be interpreted to mean, 'habitually commits theft and robbery and house-breaking within his jurisdiction, &c.,' it appears to me that the section is carefully worded in such a way as to embrace both these meanings.......I therefore find I have jurisdiction and I order, &c."

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On reference to the Sessions Judge of Dacca under s. 123 of the Code of Criminal Procedure, he on the 26th of February 1900 confirmed the order passed by the Magistrate, holding that the Magistrate had jurisdiction to try the case.

Mr. *K. N. Sen Gupta*, for the petitioners.

The Deputy Legal Remembrancer (Mr. *Gordon Leith*), for the Crown.

The following judgments were delivered by the Court (PRINSEP and HANDLEY, JJ.) :—

JUDGMENTS.

PRINSEP, J.—The petitioners who are residents of the District of Tipperah were under arrest and in confinement in the under-trial ward of the lock-up at Naraingunge, when proceedings were taken against them under s. 110, Code of Criminal Procedure, with the object of requiring them to give security for good behaviour.

It was objected before the Magistrate that he, as Magistrate of Naraingunge within the District of Dacca, had no jurisdiction to try this matter concerning persons who were residents of another district.

The Magistrate has overruled this objection and, on reference to the Sessions Judge under s. 123 for confirming the order passed by the Magistrate, the Sessions Judge has adopted the same view. The law runs thus: "Whenever a Magistrate receives information that any person within the local limits of his jurisdiction—

(*a*) is by habit a robber, house-breaker or thief, or,

(*b*)" and so forth.

The Magistrate has found that the terms of the section enable [995] him to try such a case because the law may be read thus :—"Whenever a Magistrate receives information that any person is by habit a robber, housebreaker or thief within the local limits of his jurisdiction." But the law is not so expressed and, under the ordinary rules of construction, it would not bear that interpretation. In my opinion it is when a person within the limits of a Magistrate's jurisdiction, that is, who is residing within the limits of such jurisdiction, is found to be a person of the description given above, that the Magistrate can take action, and it is not contemplated the Magistrate in such a case should issue a warrant so as to pursue the persons concerned into another jurisdiction. It also seems to me that, under the terms of this section, the reputation which the person is found to have must necessarily mean the reputation of that person in the neighbourhood, and the persons residing in that locality could be best able to speak to his character ; moreover that, if he were called upon for his defence, he would naturally produce witnesses of that neighbourhood. Thus a trial held in another district and at some distance from his residence would probably result in his being unable to obtain the attendance of his witnesses or to obtain them at an expense which it would be unreasonable to call upon him to bear. In my experience I would add that I have never come across a case of this description in which jurisdiction has been assumed by a Magistrate of another district, and from this

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I take it that the practice has been universal in regard to restricting the jurisdiction of a Magistrate to cases of persons reputed to be of bad character and residing in his own district. The proceedings, therefore, are without jurisdiction and the order must accordingly be set aside. If the petitioners are in jail in consequence of their failure to give the security required they must be released.

HANDLEY, J—I am of the same opinion and I entirely concur in the observations made by Mr. Justice Prinsep.

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27 C. 996 (P.C.)=27 I.A. 128= 4 C.W.N. 549=2 Bom. L.R. 446=7 Sar. P.C J. 633.

[996] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Morris, Devey, and Robertson, and Sir Richard Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

AMRITO LAL DUTT (*Plaintiff*) *v.* SURNOMOYE DASI AND OTHERS (*Defendants*). [8th and 9th November, 1899, and 2nd May, 1900.]

Hindu law—Adoption—Construction of will—Invalidity of authority purporting to be given to a widow jointly with others to adopt.

That no one except the widow, authorized for the purpose by her husband, can adopt a son to him after his decease is a principle in the Hindu law of adoption. The power is exerciseable by the widow alone, though restriction may be placed upon her choice of a boy by the husband's having made it a condition that persons named by him should concur in the choice.

A husband had by his will purported to authorize his widow, whom he made his executrix jointly with two other persons whom he appointed his executors, to adopt a son to him. *Held*, that by this no valid authority to adopt was given to the widow. The conjecture that the testator really meant to give authority to the widow to adopt, restricting her power merely to the extent that there should be others, his executors, who were to consent to the choice of a boy to be adopted by her, could not be accepted as a legitimate construction of the will. The authority was expressed in clear terms to be to the three.

It would also be beyond the range of judicial interpretation to construe the will as meaning that the testator only intended to provide for the appointment of a male successor to him in the property.

[R., 13 C.L.J. 85 (88)=15 C.W.N. 66=7 Ind. Cas. 921; 16 C.L.J. 304=17 C.W.N. 319 =16 Ind. Cas. 817; 9 C.W.N. 1033 (1042).]

APPEAL from a decree (5th April 1898) of the Appellate High Court (1), reversing a decree (9th March 1897) of the High Court in the Ordinary Original jurisdiction.

This suit was brought on the 1st August 1894 by the appellant who claimed to be the adopted son and heir of the late Hurridas Dutt, deceased on the 30th October 1875, on which date he executed a will containing the authority in question. Of this the plaintiff sued for the true construction as well as possession of the estate left by the testator, alleging his adoption by the [997] sole widow Surnomoye Dasi, the first defendant, now respondent, under a power given by the will.

The principal question decided on this appeal was whether the adoption had constituted the plaintiff, appellant, the lawfully adopted son of the testator, the authority to adopt having been given, not to the widow alone, but to her in conjunction with two other persons appointed executors of the will.

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(1) 25 C. 663.

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The widow by her answer left the construction of the authority in the will to the judgment of the Court, submitting that, under another clause in the will, in no case should the adopted son have any part of the testator's estate until her death; and she asked that the suit should be dismissed.

Besides the widow, the testator's two daughters, and three minor sons of one of them, were defendants and were now respondents. The defence in their answers set up was that there had been no lawful adoption of the plaintiff, the authority to adopt given by the will having been invalid in law.

The will of Hurridas Dutt, who was a Sudra subject to the law of the Dayabhaga, was in English. Its material provisions are set forth in their Lordships' judgment. The testator appointed his wife to be executrix, and his father Madhusudan Dutt, and his uncle Dwarka Nath, to be executors and trustees. Then followed the words, "I hereby authorize and empower my wife and executrix Srimati Surnomoye Dasi and my executors and trustees to whom I give full permission and authority to adopt after my decease a son."

The will was proved by the widow and the uncle, who took upon them the administration, the father taking no part.

On the 9th August 1876 the widow, with the consent of Dwarka Nath, adopted a son, but he died in 1881. She adopted on the 9th February 1881 the present plaintiff. At this adoption Dwarka Nath was present. Madhusudan was then dead. The adopted boy attained his majority on the 1st August 1894, and on that day filed this suit.

Of the issues fixed in the Original Court two only were now material:—Whether the power of adoption was valid; and was it validly exercised.

[998] A question, considered below, as to whether an accumulation directed under the will, was or was not in excess of what the law would permit, did not arise here, as the appeal was disposed of on the above issues.

The judgment of the Original Court was that the testator, desiring the adoption of a son to himself, gave his wife the power to adopt after his death, and associated the executors whom he appointed with his wife for the purpose of securing a good exercise of her discretion in the selection of a child for the adoption. It did not appear to the Judge that the testator intended to make it an essential condition of the adoption that the executors should take part in the adoption itself, from which they were by law excluded. Therefore in his opinion the power to adopt was a good one and rightly given. Upon the second issue his judgment was that the power of adoption was not lost by the death of one of the executors, the condition that their consent to the choice of the child should be given having been sufficiently complied with by the survivor having consented; and he concluded that the authority given in the will had been validly exercised in the adoption of the plaintiff by the widow.

From the decree that followed this, the plaintiff, in April 1897, was the first to appeal in so far that it declared him not entitled to accumulations in the will directed, nor to immediate possession. The defendants on the 1st June 1857 filed cross-objections asserting the invalidity of the adoption.

The appellate High Court held that according to the true construction of the will, the power to adopt was a joint power given to the widow and the executors, and that such a power was not in law valid. The suit was dismissed.

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The judgments of both the Courts are given at length in the I. L. R., 25 Cal. 663.

The plaintiff now appealed.

1899, November 8 and 9. The Rt. Hon'ble *H. H. Asquith*, Mr. *J. D. Mayne*, Mr. *J. H. A. Branson*, and Mr. *W. C. Bonnerjee*, for the appellant, argued that by the 8th clause of the will authority had been validly given to the widow to adopt as she had adopted. The will should be so construed as to give [999] effect to the testator's intention that governed—that there should be an adoption. The authority given was indeed taken literally to three persons jointly; but only one of the three, the widow, could receive and act upon that power, according to Hindu law. The will was capable of the construction to the effect that it gave authority to her to adopt, subject to the condition that she obtained the consent of her co-executors in the choice of the boy to be adopted by her alone. The testators knew, as it was a matter of common knowledge among Hindus, that the widow alone could be authorized by him to adopt a son to him after his death. It should only be in the case of no other construction being possible that a Court should attribute to the testator that he had intended to give to his executors a power which he must have known could not be exercised. Their authority stopped at consenting, or refusing to consent, in the choice of a boy. Such of the three persons, the executors and the widow, had a separate duty; but only the act of the widow operated to effect a valid adoption, and its validity was not affected by the fact that the co-operation of the others was ineffectual, except in so far as fulfilling the condition on which the widow's authority vested in her. The power given to each of the three should be considered a separate power in respect of what each could perform, and the duty of the executors was merely to aid in the selection of a child suitable to be adopted. The will could hardly be said to direct anything to be done that would be contrary to the Hindu law, seeing that every act in the way of the actual adoption had to be done by the widow alone, and that any such act if done by an executor would be merely inoperative and of no assistance or effect.

On the construction of powers in Hindu wills reference was made to *Bai Motivahu* v. *Bai Mamubai* (1). The fair view would be that the testator only intended that there should be the concurrence of the three persons in the choice of a boy.

Mr. *A. Cohen*, Q. C., Mr. *M. Crakanthorpe*, Q. C., and Mr. *A. Phillips*, for the respondents, argued in support of the judgment of the High Court, The joint power which the will purported to confer upon the widow, appointed executrix, and upon the father and uncle of the testator, appointed executors, to adopt a son to [1000] him, was invalid, because it did not accord with the Hindu law. The language of the will purporting to empower the executors was clear. If the widow were to die in their lifetime the executors were to adopt. No such limit as that they should merely concur in the choice of a child to be adopted was found in the will, nor was there, on the words of the will, any intimation that the testator intended that the widow should adopt, either with or without the concurrence of the co-executors, by her sole authority. The authority being a joint one all the three must act or no one. The widow was not empowered to adopt separately. Even if the power to adopt had not been invalid on account of its having joined with the widow persons who could not be legally authorised by the testator to adopt, it would remain that it

(1) 21 B. 709 = 24 I. A. 93.

could not be exercised unless the three were acting together, and could not be validly exercised after the death, which had occurred, of one of them. If the intention of the testator was as had been represented in the case argued for the appellant, this intention had not been expressed in this will. This intention had been founded on conjecture, and there was no substantial ground for accepting the suggestion.

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Hunter v. *Attorney General* (1); and *Abbott* v. *Middleton* (2) were cited.

The Right Hon'ble *H. H. Asquith* replied.

Cur. adv. vult.

JUDGMENT.

1900, *May* 2. The judgment of their Lordships was delivered by

LORD HOBHOUSE.—This is a suit instituted before the High Court of Judicature in Calcutta in its Original Jurisdiction for administration of the estate of Hurridas Dutt, who died on the 30th October 1875, having executed a will on the same day. He had no son, but left a widow Surnomoye Dasi and two daughters who were all defendants below and now are respondents. The plaintiff in the suit, now appellant, claims to be the son of the testator adopted by virtue of a power contained in his will; and the cardinal question in the suit is whether or no he bears that character.

[1001] The material passages in the will, which was written in English, are as follows :—

"I appoint my wife Srimati Surnomoyi Dasi the executrix, and my father Babu Madhusudan Dutt of Mullick's Street aforesaid, and my uncle Babu Dwarka Nath Dutt of Thuntoneah in Calcutta aforesaid, the executors and trustees of this my will.

Para. 8. "Whereas having no son born to me of my body I am desirous of adopting one in my lifetime, but in case I depart this life before carrying such my desire into effect, I hereby authorise and empower my wife and executrix Srimati Surnomoye Dasi, and my executors and trustees, to whom I give full permission and liberty, to adopt after my decease a son, and in case of his death during his minority or on attaining his full age and without leaving male issue, to adopt a second son, and in case of his death during minority or on attaining such age and without leaving male issue, to adopt a third son, and no more. In any of the above cases of adoption, should the adopted son die leaving a son or sons, the power of adoption shall cease or remain in abeyance during the life or lifetime of such son or sons of such adopted son, but shall revive on the death of such son or sons during minority.

Para. 13. "I authorise and empower my said executrix and executors and trustees and the survivor of them and the trustee for the time being of this my will, to appoint any other person or person to succeed them or him in the execution of the trusts of this my will.

Para. 15. "In case of any accident arising to cause my wife to depart her natural life before adoption of a male child my surviving executors are empowered to act with my full consent and direction to adopt a male issue. Dated this 30th October 1875."

By the ninth clause the testator provided an income for his wife and adopted son during the life of his wife and directed accumulation of the

(1) (1899) L. R. Ap. Cas. 309 (317). (2) (1858) 7 H. L. C. 68 (114).

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surplus income. The adopted son is to take the property if he survives the widow and attains the age of 18, otherwise it is given over to the daughters.

The will was proved by the testator's widow and his uncle Dwarkanath Dutt. The testator's father Madhusudan Dutt did not renounce probate, but he never took any part in the administration of the estate.

On the 9th August 1876 a deed was executed by which the widow purported with the consent of Dwarkanath Dutt as executor to accept Joti Pershad Mullick, a boy five years old as the adopted son of the testator. In the year 1877 Madhusudan [1002] Dutt died, and in January 1881 Joti died being then ten years old. On the 9th February 1881 a deed was executed by which the widow purported, by virtue of the authority given to her by the will, and with the consent of Dwarkanath Dutt, as executor, to accept the plaintiff then a boy of eight years old as the adopted son of the testator. After attaining his majority the plaintiff instituted this suit in the year 1894.

The cause was heard in the first instance before Mr. Justice Jenkins who held that the plaintiff was rightly adopted and proceeded to determine the other questions arising under the will. He held first, that the testator had given the power of adoption to his widow subject only to the assent of the other executors, 2ndly, that the death of Madhusudan did not destroy the power, and 3rdly that the terms of the adoption deed were in sufficient conformity with those of the will. Both parties appealed from his decision.

The Court of Appeal consisting of Chief Justice MACLEAN and Justices MACPHERSON and TREVELYAN were unanimous in holding that there was no adoption of the plaintiff. Their main ground was that the power of adoption which the testator purported to give was one which the law does not allow. They further intimated an opinion that even if the power could be held valid by virtue of the construction adopted by JENKINS, J., it could not be exercised after the death of Madhusudan. They therefore dismissed the suit.

Their Lordships felt no doubt during the argument that the testator could not confer any such power as he desired. That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu law, and one so constantly occurring in ordinary life, that it is dfficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in various ways, and among them by requiring the consent of persons named by the husband, is also familiar law. If it turns out that such consent cannot be procured she has no authority to adopt, and that is the question which has been raised in this case with reference to the death of Madhusudan. But the fundamental objection arises not on the events that have happened but on the provisions of the will as it stood at the [1003] testator's death. It never gave any authority at all to the widow. In terms, the literal construction of which admits of no doubt, he authorised an appointment not by his wife, but by her and the two others whom he had appointed executors and trustees. Whether he intended the authority to be attached to the office can make no difference; or if it did make any it would not be favourable to the plaintiff. It was given not to a single person but to several. Not only so, but the testator went on to authorise his surviving executors to adopt a boy after his wife's death; while rather significantly he did not authorise her to adopt after their death; and

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yet she was more likely to be the survivor than the members of the elder generation.

The suggestion that the testator really meant to give authority to the widow restricted by the consent of the others cannot be accepted as a legitimate construction of his will. It is a mere speculation, and we may speculate in other directions. When using the term adoption the testator may have been thinking merely of the choice of a male successor in the property ; seeing that he does not leave the adoption to carry with it the ordinary right of succession, but subjects the inheritance to rather capricious conditions ; postponing enjoyment during the widow's life, and making the boy's interest in the corpus contingent on his surviving the wife, and attaining 18. Such speculations however are, in a case in which the language conferring the authority is clear, and there is nothing in other parts of the will inconsistent with it, quite beyond the legitimate range of judicial interpretation.

The joint power conferred on the three executors being invalid the plaintiff has no status in the family and his suit was rightly dismissed. Their Lordships will humbly advise Her Majesty to dismiss this appeal and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant : Messrs. *Watkins & Lempriere.*

Solicitors for the respondents : Messrs. *Gush, Phillips, Walters, & Williams.*

C. B.

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27 C. 1004 (P.C.)=27 I.A. 103=4 C.W.N. 565=7 Sar. P.C.J. 718.

[1004] PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Davey and Robertson and Sir R. Couch.

[*On appeal from the High Court at Fort William in Bengal.*]

FATIMATULNISSA BEGUM AND OTHERS (*Plaintiffs*) *v.* SUNDAR DAS AND OTHERS (*Defendants*). [16th February and 24th March, 1900.]

Limitation Act, XIV of 1859, *s.* 1, *cl.* 15—*Act IX of* 1871, *s.* 29 *and art.* 148—*Usufructuary mortgage—Limitation of suit—Extinction of mortgagor's title—New starting point by acknowledgment.*

The representatives in estate of a mortgagor, who executed a usufructuary mortgage dated 17th October 1788, sued the heirs of the mortgagee in 1893, alleging payment of the mortgage in 1881, and claiming the possession of the mortgaged property or other relief.

The suit, in the absence of acknowledgment made within sixty years satisfying the requirements of the law of limitation for extension of that period, was barred on the 17th October 1848, by the effect of Act XIV of 1859, s. 1, cl. 15, which barred the suit after the 1st January 1862. Afterwards, by the effect of Act IX of 1871, s. 59, the right of property in the mortgagor was extinguished.

In none of the documentary evidence adduced by the plaintiffs was there shown to have been made during the sixty years from the date of the mortgage onwards, any written acknowledgment, satisfying the requirements of the above cl. 15, and thereby giving ground for computing limitation from the date of such acknowledgment. Nor did the fact that a lease was made on the 8th January 1872 of some of the mortgaged property by one of the then mortgagees to one of the mortgagors, the lessor describing himself as usufructuary mortgagee, preclude the defendants from asserting their true title. The description neither estopped the alleged mortgagee from denying that he was in that character at the

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time of this suit, nor was it a representation which required that he should make it good. It was no essential part of a contract between these parties, and it did not affect the issue now raised. The judgment in *Citizens Bank of Louisiana* v. *First National Bank of New Orleans* (1), referred to.

[R., 28 A. 333 = 3 A.L.J. 113 = 26 A.W.N. 23; 31 C. 314 (317); 5 Bom. L.R. 97 (100); 6 Bom. L.R. 864 (867); 13 C.L.J. 625 (630) = 6 Ind Cas. 392; 14 C.L.J. 292 = 16 C.W.N. 351 (354) = 11 Ind. Cas. 465 (468); 16 C.L.J. 349 = 17 C.W.N. 873 = 16 Ind. Cas. 927 (928); 11 Bom. L.R. 318 (323).]

APPEAL from a decree (16th June 1896) of the High Court reversing a decree (30th March 1894) of the Subordinate Judge of Shahabad.

This suit was brought on the 20th February 1893 by the appellants who represented the estate of a mortgagor, an ancestor common to them and to three of the seven defendants. To secure a debt, he executed, on the 17th October 1788, a usufructuary mortgage of villages in Shahabad to three creditors, one of whom [1005] was Sadhu Ram, now represented by the other defendants, three of them being his heirs. The first had come in as a purchaser of part of the property in suit. These four alone defended the suit, the others having answered favourably to the plaintiffs. The sum originally secured was Rs. 1,27,720. In 1806 a part having been paid a fourteen annas share of the debt was excluded from the security, a proportionate part of which remained charged with only the two annas share belonging to Sadhu Ram. Of this property the plaintiffs, alleging that the debt had been paid off in 1881, claimed possession, or that the right to redeem should be declared.

The defence was that the suit was barred by lapse of time in 1848 by the enactment of Act XIV of 1859, and that the plaintiffs' title had been extinguished by the Limitation Act, IX of 1871, s. 29. The issues, besides relating to these points, included the question, which was also raised by this appeal—from what date was the period of limitation to be computed. This involved whether the defendants' position as usufructuary mortgagee had been acknowledged, during the sixty years terminating in 1848, in a manner satisfying the requirements of cl. 15.

Copies of decrees in suits of 1817, and of 1819, reciting pleadings, were referred to in the first Court, having been alleged by the plaintiffs to show that the defendants retained the character of mortgagees. Also written transactions, comprising entry in the collectorate register, leases, and receipts for rent, were received in evidence in that Court.

The Subordinate Judge's decree was in favour of the plaintiffs. In his opinion the evidence had shown that the mortgage had been satisfied by the usufruct of the mortgaged property as far back as in 1830, and he held it to have been clearly established that the defendants were in possession as mortgagees, who had acknowledged the title of the plaintiffs' predecessors as mortgagors, by written acknowledgments coming within cl. 15, and made within the period of limitation, so that they had given rise to a starting point, bringing the suit within the sixty years' limit.

That decree was reversed on the defendants' appeal to the High Court (TREVELYAN and BEVERLEY, JJ.), who dismissed the [1006] suit as barred by time under Act XIV of 1859. The material part of their judgment was the following :—

" The first question is from what date limitation began to run. As we have already pointed out, there is nothing whatever in this case to show that there was any new arrangement which effaced the original mortgage.

(1) (1873) L.R. 6 E. & I. App. 352 (360).

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The rights both of the mortgagor and mortgagee continued to be determinable by the original mortgage, although a portion of the debt had been cleared off and a portion of the property released. As we have pointed out, we can find no trace of any such arrangement in any portion of the previous litigation. The plaintiffs' ancestors throughout that litigation based their rights on the original deed. In their present plaint, the plaintiffs do the same. We do not find that the suggestion of a new arrangement was made in the Court below. We have no hesitation in coming to the conclusion that the time ran from 1788, and that unless there be evidence of an acknowledgment such as to satisfy the requirements of s. 1, cl. 15 of Act XIV of 1859, the sixty years expired in 1848, and therefore the suit was barred if not brought before the 1st January 1862. Was there such an acknowledgment? The acknowledgments relied upon by the plaintiffs between the years 1788 and 1848 are to be found in decrees made in the previous litigation, which purport to recite a plaint of the ancestors of the present defendants on the 14th of July 1817, and a written statement of the 1st of June 1820. The learned Judge of the Court below has relied upon admissions in those pleadings. The first question is, whether any case has been made for secondary evidence of the plaint and written statement. The second question is, whether secondary evidence according to law has been given. And the third question is whether, even if the copies of the plaint and written statement set out in the decrees amount in law to secondary evidence of such plaint and written statement, they are sufficient to take the case out of the operation of the law of limitation.

"On the first question we hold that a case has been made for secondary evidence. It is not very clear whether the records of suits relating to the Shahabad district but decided by the Provincial Court at Patna, would be kept at Arrah or at Patna; but as far as we can see they would have been probably kept in the Shahabad Court. Apart from the evidence in this case, it is a matter of notoriety that during the Mutiny the records of the Civil Courts at Arrah were destroyed.

"It is not necessary for us to decide the second question. If we had to decide it, we should have to consider how far we could follow the decision of this Court in the case of *Parbutty Dassi* v. *Purno Chunder Singh* (1).

"We think it quite clear that we must hold, on the third question, that the requirements of the Limitation Act have not been satisfied. The case of *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (2), decides that it is **[1007]** only an acknowledgment signed by the hand of the mortgagee himself, which will take the case out of the operation of the Act. If according to the law of procedure in force at the time the plaint or written statement was required to be signed by the party himself, we might have been able to decide this question in favour of the plaintiffs; but on referring to Reg. IV of 1793, which contained the law of procedure then in force in Civil Courts, we find that the plaint might be signed by the plaintiff or his pleader, and that a written statement did not require any signature at all. It follows that it is consistent with the evidence in this case, that the plaint of 1817 was signed by the pleader and that the written statement of 1820 was either signed by the pleader or not at all. We cannot therefore hold that the acknowledgments were signed in the way provided by s. 1, cl. 15.

(1) 9 C. 586.

(2) 13 B.L.R. 177=20 W.R. 375.

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"Holding, as we do, the view that between 1788 and 1848 there was no acknowledgment to take the case out of the Act, it is unnecessary for us to consider the documents which have been put forward as acknowledgments after 1848."

On this appeal,

1900. FEB. 16. Mr. *R. B. Haldane*, Q. C., and Mr. *J.D. Mayne*, for the appellants, argued that there was error in the judgment of the High Court in their dismissing the suit as barred by limitation under Act XIV of 1859, s. 1, cl. 15. It was contended that the period of limitation had not run from the date of the mortgage in October 1788, and that the finding of the High Court as to there having been no sufficient acknowledgment proved to have been made before the expiration of the sixty years from the date of the mortgage was not according to the evidence. The High Court, moreover, had recorded no finding as to the date when they considered the debt to have been paid off, although there was no evidence to support the finding of the first Court that it had been paid as far back as 1830; and there was no evidence as to when it was paid off. The appellants' claim that they were entitled to possession, or, if any money remained due, to redemption, was supported by the respondents having recognized their position as mortgagees, and if the repeated recognitions fell short of being acknowledgments within the requirements of the Act XIV of 1859, s. 1, cl. 15, at all events they afforded relevant evidence of the fact of the continuance of the mortgage and of the defendants having treated it as a subsisting fact. As an acknowledgment within the Act, the writing, if duly signed, fixed a date for a starting point, but as a piece of [1008] evidence not having that effect, but showing or tending to show the relation of mortgagee and mortgagor at the time, the documentary evidence was of value, and supported the case of the appellants. The application of the sixty years' bar to run from the date of the instrument, whilst it was uncertain whether the usufruct had realized the debt or not, had been made by the judgment of the High Court. Besides the above contention, a main argument was that the respondents were precluded by their own acts and statements from denying that, at the time of suit brought, they were holding the land as usufructuary mortgagees. Reliance was placed on the fact adverted to in the judgments below, of the lease having been made in 1872, under the circumstances, and with the description therein, of the lessor as usufructuary mortgagee. They referred to *Luchmee Buksh Roy* v. *Runjeet Ram Panday* (1). The description in the lease was a representation that the relation of the defendants to the plaintiffs as mortgagors continued.

Mr. *A. Cohen*, Q. C., Mr. *J. H. A. Branson* and Mr. *G. A. H. Branson*, for the respondents, argued that the judgment of the High Court had rightly been that the appellant's claim was barred by the sixty years limitation in October 1848; there not having been shown to be any writing signed by the mortgagee, or some person claiming under him, which could give a fresh date, or one other than the 17th October 1788, from which the period of limitation could be reckoned. By the Regulation Law of Bengal any such suit as the present, claiming immoveable property, was subject to an utmost limit " of sixty years " title by non-claim. They referred to Reg. XV of 1793 and II of 1805, which showed upon their language that the bar of a suit was accompanied by the extinction of title.

(1) 13 B. L. R. 177 = 20 W. R. 375.

The High Court had rightly grounded the decision of the case upon Act XIV of 1859, which applied the law of limitation to mortgages, and therefore barred this suit, in the absence of any acknowledgment, sufficient within that Act, to extend the period and the title of the plaintiffs as mortgagors had been extinguished by the subsequent enactment of the Act IX of 1871, s. 29. They referred to the abovementioned case of *Luchmee Buksh Roy* v. **[1009]** *Runjeet Ram Panday* (1) of the year 1873, and to *Dharma Vithal* v. *Govind Sadvalkar* (2), where the observations of West, J., in the matter of the intention in acknowledgment are to be found.

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Mr. *R. B. Haldane*, Q. C., replied.

Cur. adv. vult.

JUDGMENT.

1900. MARCH 24. Their Lordships' judgment was delivered by

LORD HOBHOUSE.—The plaintiffs below, now appellants, are the representatives in estate of one Nurud Hossein Khan, who on the 17th of October 1788 effected a usufructuary mortgage of the property now in dispute along with other property to secure the sum of Rs. 1,05,783 due on bonds to three several persons. One of the mortgagees was named Sadhu Ram to whom one of the bonds was owing. In some way not now apparent a settlement was made in or about the year 1806 by virtue of which the other creditors were satisfied and 14 annas of the property released. A two anna share remained as a security to Sadhu Ram, but on the terms of the original mortgage adjusted to the division of interest. It will be convenient to speak of the parties and their successors respectively as mortgagors and mortgagees. The terms of the mortgage are as follows :—

"Until the whole and entire sum the principal aforementioned and interest thereon, whatever that may be by account, is not repaid to the aforenamed persons, the said villages shall remain in the possession and enjoyment of the aforenamed persons : they will year by year take the proceeds thereof and then give, without objection, receipt annually for Rs. 6,201, in part payment of the aforementioned debt. They will with confidence keep cultivating the aforesaid mouzahs. If there be an increase in the proceeds derived from the villages or if there be a decrease, which God forbid, they will take the profit and loss on themselves. I have and will have by no means any concern with the increase or decrease."

In the year 1817 the mortgagees, having been dispossessed by the mortgagors, sued for possession of their two anna share, and the Court granted them a decree on that footing, adding that "if the defendants have any objection as to the money of the usufructuary mortgage having been liquidated they are at liberty to bring a separate suit."

The mortgagors did bring a suit accordingly in the year **[1010]** 1819 praying for possession of the land and return of their bonds on the ground that the mortgagees had been overpaid. By the decree of the District Judge dated 3rd October 1820, it was found that the mortgagees had not been paid ; and the suit was dismissed, but with some directions for the final payment in liquidation of the mortgage and for the restoration of the land in the year 1231 Fasli, A. D. 1824 or thereabouts. This litigation was continued by appeals to the Provincial Court and thence to

(1) 13 B. L. R. 177 = 20 W. R. 375. (2) 8 B. 99 (102).

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the Sudder Dewani Adawlat. On 27th August 1833 a final decree was passed finding that the mortgagees were not paid and dismissing the mortgagors' appeal. The mortgagees have been in possession ever since.

On the 20th February 1893 the present suit was commenced by the mortgagors who allege that the whole debt was discharged in 1288 Fasli (A. D. 1881), and pray for possession and other relief. It is not necessary to consider any other defence than that of bar by time.

The earliest law which placed a limit of time upon suits by mortgagors to recover the mortgaged property is Act XIV of 1859. It was thereby provided (s. 1, cl. 15) that no suit shall be maintained against a mortgagee of immoveable property for recovery of the same unless it is instituted within 60 years from the time of the mortgage; or, if in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given in writing signed by the mortgagee or some person claiming under him, from the date of such acknowledgment in writing. This Act remained in force till repealed by the Limitation Act of 1871. By s. 18, coupled with a subsequent Act XI of 1861, suits instituted before the 1st January 1862 were to be determined as if the Act had not been passed.

According to the terms of this law suits by the mortgagors of 1788 were barred on the 17th October 1848 unless in the meantime the required acknowledgment was given. Their right to sue was kept alive till 1862; but as they did not sue, the Act remains unqualified by that proviso.

The Act of 1871 provided the same limits of time for suits of this kind, and it added the provision (s. 29) that at the [1011] expiration of the period thereby limited to any person for instituting a suit for the possession of any land his right to such land shall be extinguished. The period thereby limited in the case of this mortgage was the 17th October 1848 and the title of the mortgagors was extinguished on that day unless they can show a previous acknowledgment in writing.

The Subordinate Judge decided in their favour on this point. He relied on the proceedings in the suits of 1817 and 1819. The records had been destroyed in the Mutiny, but the mortgagors produced copies of the decrees which recited the pleadings. The plaint in the earlier suit and the written statement in the later asserted the title of the mortgagees as such. The Subordinate Judge considered that he was bound to presume that these pleadings were signed by the mortgagees because the law required them to do it. The High Court, however, point out that there was no such law then existing; plaints might be and were signed by vakils, and written statements did not require any signature at all. Therefore there could be no presumption that any such acknowledgment as the Acts of 1859 and 1871 require was given by the mortgagees.

These pleadings constitute the only ground for alleging that prior to the 17th October 1848 any written acknowledgment of title was given by the mortgagees to the mortgagors. As this ground fails, it follows that as from the 17th October 1848 the right of the mortgagors to sue was barred by force of the Act of 1859, and their right to the land was extinguished by force of the Act of 1871.

The Subordinate Judge also relies on a number of transactions which go to show that the mortgagees considered that they still retained that character. In that character they applied for mutation of names in the Collectorate Register, and they granted leases, and they gave receipts for

rent. The High Court did not think it necessary, nor do their Lordships, to examine those transactions in detail. Only one took place prior to the extinction of the mortgagors' title in 1848, and that is an application for mutation of names in 1839 which was not an acknowledgment made to the mortgagors, but only an official proceeding to substitute the [1012] successor of a mortgagee for his predecessor under the title which then actually existed.

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Only one of these transactions has been seriously insisted upon during the present argument. On the 8th January 1872 Beni Prashad, a mortgagee, granted to Makbul Fatima, a mortgagor, a lease of the mortgaged property or part of it for a term of 10 years. In this grant the lessor is described as usufructuary mortgagee. This is not now put forward as an acknowledgment which gave a new starting point of time for limitation. But Mr. Haldane contended that it estopped the mortgagee from repudiating that character in a litigation with the mortgagor. If the lessor were seeking to impeach the lease on the ground that he was not usufructuary mortgagee he would be estopped. But the lessee had the full benefit of the lease, and for matters outside the lease it contains nothing to preclude the lessor from asserting his true title.

But it is further contended that this description of the lessor amounts to a representation which he is bound to make good. In order to succeed on this ground the mortgagors must show that the description of the lessor was an essential part of the contract, that the lessee made the contract in reliance on those terms, and that her position was in some way altered by the terms in which her lessor spoke of himself. (See *Citizens Bank of Louisiana* v. *First National Bank of New Orleans* (1)); and unless the lessee could show at least so much she would have no foundation for contending that her extinct right was revived or rather re-granted by the terms of the lease. In effect what is asserted for her is the creation of a new right. But there is not a vestige of evidence for any such case, nor any reason to believe that the description of the lessor was anything but a mere continuance of the description by which the mortgagees were entered as proprietors in the Collector's books in 1839.

The case is a singular one. Probably the time at which the title of the mortgagors to sue became extinct or at which their right was barred was not clearly present to the minds of the mortgagees or indeed of either party. But that does not [1013] prevent the operation of the law which lays down fixed rules for the bar of suits by time. The High Court have rightly interpreted it and their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs.

Appeal dismissed.

Solicitors for the appellants : Messrs. *T. L. Wilson & Co.*
Solicitors for the respondents : Messrs. *Watkins & Lempriere.*

C. B.

(1) (1873) L.R. 6 E. & I. App. 352 (360).

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AUG. 6.

ORIGINAL CIVIL.

27 C. 1013.

27 C. 1013.

ORIGINAL CIVIL.

Before Mr. Justice Stanley.

SARAT CHUNDER SINGH *v.* NITYE SUNDER SINGH.*
[31st July and 1st and 6th August, 1900.]

Hindu law—Joint family—Partition—Right to an account—Suit for partition referred to arbitration but property not wholly partitioned—Infant's right to an account of his share of the property partitioned, and unpartitioned.

A, a member of a Hindu joint family, died leaving a widow and no issue. By his will he appointed *B*, *C*, and *D*, members of the joint family, his executors, and gave his widow power to adopt. In pursuance of that power the widow adopted *E*.

The executors instituted a suit for partition of the joint estates, and the suit was referred to the arbitration of *Z*. He died without having partitioned the whole of the property, and an application was then made to the Court to determine the partition. The Court granted the application and the suit came on for trial. The infant *E*. asked for an account to be taken of the dealings of the joint property, and of the rents and profits, on behalf of the estate of his late father, from the death of his father up to the appointment of a Receiver.

Held, that in respect of the properties remaining unpartitioned the infant was entitled to an account of the dealing of the joint-property, and of the rent and profits from the death of his father up to the time a Receiver was appointed, but as to the properties already partitioned, he was not so entitled.

THIS was a suit for partition of a Hindu joint family estate, the property having been partly partitioned by reference to arbitration.

The following are the facts in this case :—

An action was brought in the year 1889 (suit 285 of that year) **[1014]** by Sarat Chunder Singh against the other joint owners with him of an estate in Calcutta known as the Pykeparah Raj estate, for partition of the estate, and other relief prayed for. In this partition suit two brothers, *viz.*, Protap Chunder Singh and Issur Chunder Singh were the owners of the estates.

Upon the death of Protap Chunder Singh, his four sons, *viz.*, Grish Chunder Singh, Poorno Chunder Singh, Kanti Chunder Singh and the plaintiff Sarat Chunder Singh, became entitled to an undivided moiety of the estate.

Upon the death of Issur Chunder Singh, his son, Indra Chunder Singh, became entitled to his undivided moiety. Kanti Chunder Singh afterwards died having by his will left his share to his two brothers, Poorno Chunder Singh, and Sarat Chunder Singh.

Grish Chunder Singh afterwards died having also left a will whereof he appointed Poorno Chunder Singh, Kanti Chunder Singh, Indra Chunder Singh and Sarat Chunder Singh, the executors. Under the provisions of that will, Grish Chunder Singh, who is now a defendant, was adopted, by Grish Chunder's widow, and he was entitled to the share of Grish Chunder Singh, *i. e.*, a two annas share in the estate. Poorno Chunder Singh and Sarat Chunder Singh were each entitled to a three annas share, and Indra Chunder Singh, who had since died, became entitled to the remaining eight annas share.

In the month of September 1866, the management of the estate was taken over by the Court of Wards, and the Collector divided the surplus

* Original Civil Suit No. 41 of 1899.

income amongst the beneficiaries in proportion to their shares as above stated, and kept separate accounts of the shares of each member of the family. In the case of the share of Grish Chunder Singh, he made over his share to the executors of his will, including the surplus income and the investments therefrom. As each of the members of the family attained full age, he obtained from the Court of Wards his share of the property, and releases were executed in favour of the Secretary of State.

Subsequently the parties appointed a Mr. Robert Harvey, manager of the property, for the purpose of economical and proper management.

[1015] Srish Chunder Singh was then still a minor and his property had been throughout under the control and management of the executors of Grish Chunder Singh. Under these circumstances the plaint was filed by Sarat Chunder Singh, for partition, and by agreement of the parties, which was sanctioned and approved of by the Court, and found to be beneficial for the minor, it was referred to Mr. Phillips, as arbitrator, to adjust and settle all matters in difference between the parties. By the reference to arbitration, the arbitrators were empowered to make separate awards. Mr. Phillips entered upon the arbitration, and made an award in respect of certain properties, which were found to be debutter properties, and he also determined the question of maintenance of the widow of Protap Chunder Singh. He, however, left India, whereupon it became necessary either to proceed with the suit in the ordinary course as regards the matters which had been left undetermined by him, or else to appoint another arbitrator. By agreement of the parties the late Sir Romesh Chunder Mitter was selected as an arbitrator to complete the work which was left unfinished by Mr. Phillips, and the agreement of reference left it open to him as in the case of Mr. Phillips to make separate awards. Sir Romesh Chunder Mitter entered upon the arbitration, and he partitioned a considerable portion of the estate, but died before the arbitration was completed.

Under these circumstances an application was made to the Court with a view of having such proceedings directed, as might be necessary for the purpose of terminating the suit, and upon the hearing of that application the Court gave the parties leave to proceed with the suit, in the event of their not agreeing to the appointment of another arbitrator to determine all matters left undetermined. The Court accordingly directed that the suit should proceed and that any of the defendants, if so advised, should be at liberty to file written statements. Written statements were filed by two of the parties, *viz.*, by the Administrator-General of Bengal, who now represented the deceased Indra Chunder Singh, and by Srish Chunder Singh.

1900, *July* 31, *August* 1.—The Advocate-General (Mr. *J. T. Woodroffe*) (Mr. *Pugh* with him), for the plaintiff.—No account can be gone into in this case, at this stage. The Court cannot **[1016]** enlarge the accounts beyond the accounts asked for in this suit. When the case went before the arbitrator, there was no suggestion of any account being wanted by any of the parties. The estate remained in Mr. Harvey's hands till a few months before the suit, and he managed for all of them. The awards were made and confirmed, and the Receivers' books destroyed, except as to Srish Chunder Singh's share. All accounts necessary to ascertain the value of the property were before the arbitrator. What took place in suit No. 285 of 1889 is really the cause of this application. In the plaint of that suit, the same facts were stated as are now attempted to be raised in this suit. Sarat Chunder filed his written statement in that case, and a

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decree was made on the 16th of February 1891. The executor defendants have not attempted to surcharge and falsify the accounts, but they have insisted on every payment over Rs. 20 being vouched. For the space of 11 years no claim has been made in respect of the accounts now demanded. No such accounts can be taken under the decrees made. The properties were divided and Sir Romesh Chunder Mitter examined the accounts. Each of the parties has got the separate books and papers showing what is due to each of them.

Mr. *O'Kinealy* (Mr. *Choudhry* with him), for the defendant Satis Chunder Singh supported the contention of the *Advocate-General*, and submitted that everything had been partitioned, except a dwelling-house and some minor portions of the property—Mayne's Hindu Law (5th ed.), para. 429, p. 529.

Mr. *S. P. Sinha* (with Mr. *W. C. Bonnerjee*), for the Administrator-General, supported the contention of the *Advocate-General*, and submitted that in a joint family questions as to whether or not each of the members of the jointly family has overdrawn are matters which cannot be gone into.

Each of the members of the joint family is living apart, and therefore the accounts required by the defendants could not possibly be joint family accounts.

Mr. Harvey was appointed to manage the property of each of the members of the family, and he was responsible to each of them. Only one paragraph of the plaint speaks of a joint family.

[1017] The accounts are not within the scope of this suit, and further, the defendants are estopped from being allowed to ask for accounts to be taken.

Mr. *Hill* (Mr. *R. Mitter* and Mr. *Chakravarti* with him), for the infant defendant.—This is a suit for partition of a joint estate. Has any thing been done in the previous proceedings which would bar the infant from applying for accounts to be taken? He is entitled to an account. Has that right been waived? No account has yet been taken and the matters of which the infant defendant complains are not legitimate family expenses. This is a joint family; see paras. 25, 27 and 1 of the plaint.

The fact of it being a partition suit gives the Court the right to order accounts.—Mayne's Hindu Law, paras. 262 and 429. *Chuckun Lall Singh* v. *Poran Chunder Singh* (1), *Abhay Chandra Roy Chowdhry* v. *Pyari Mohan Guho* (2). The order of the 13th September 1893 shows there is a right to an account; see proceedings in the reference in Indra Chunder Singh's suit. The infant's claim is not barred by the orders made in Indra Chunder Singh's suit. There has never been any division of any money in the Receiver's hands.

The account the infant defendant claims is:—(*a*) An account of whether the surplus profits were properly credited to his share, and (*b*) an account of the arrears collected by the executors as trustees for him under the award.

The Advocate-General (Mr. *J. T. Woodroffe*) in reply.—The accounts of a joint family are only for the purpose of ascertaining the accounts of shares of the co-partners—*Sookhmoy Chandra Das* v. *Monohari Dasi* (3), *Abhay Chundra Roy Chowdhry* v. *Pyari Mohan Guho* (2).

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(1) 9 W.R. 483. (2) 5 B.L.R. 347.
(3) 11 C. 684 (692) = 12 I.A. 103 (111).

The family were joint in worship; that is the last link that is snapped in a joint Hindu family. They were joint in estate, and they were living separately.

The Court of Wards collected the whole income of the property [1018] as a joint matter. The second account cannot be taken, there is no allegation with regard to it. As the first account, it cannot be gone into now owing to the order in Indra Chunder Singh's suit. The case has been referred to arbitration.—Simpson on Infants, 491. A Receiver was appointed in 1889, and Sir Romesh Chunder Mitter was appointed, and made his award in 1889. The joint property of the family has been divided, and if now this claim were granted it would involve the re-opening of the whole matter. Sir Romesh Chunder Mitter made all the necessary accounts, and it is submitted they cannot be gone into now. The infant must raise the defence, if he wishes to rely on it.

Cur. adv. vult.

JUDGMENT.

1900, *August* 6. STANLEY, J.—(After stating the facts as above) continued.

Under these circumstances an application was made to me with a view to having such proceedings directed as might be necessary for the purpose of terminating the suit, and upon the hearing of that application I came to the conclusion that the only course open to the parties in the event of their not agreeing to the appointment of another arbitrator to determine all matters left undetermined was to proceed with the suit according to the ordinary course of the Court, and I accordingly directed that the suit should proceed and that any of the defendants, if so advised, should be at liberty to file written statements. Written statements have been filed by two of the parties, *viz.*, the Administrator-General of Bengal who now represents the deceased Indra Chunder Singh, and on the part also of Srish Chunder Singh.

Upon the case coming on for hearing a question was raised as to what matters remained to be determined in the action. There was some suggestion that evidence might be necessary, but I do not understand that the parties want this, and this question was discussed at considerable length.

The question, therefore, for my determination is what matters remain to be determined in this action for the purpose of having this suit wound up. So far as regards the matters in difference which have been determined by the arbitrators they have been embodied in decretal orders and cannot be disturbed. [1019] It is admitted that portions of the joint property of the parties have not yet been partitioned. As to this there must be a reference to the Registrar to enquire and report what property, moveable and immoveable, remains joint and unpartitioned and a division and partition of this property must be directed so far as the same is partible. There is no dispute as to this.

The defendant, Srish Chunder Singh, who is an infant, has through his guardian filed a written statement and in this statement he alleges that no account has been taken of the dealings with the joint property and of the rents and profits thereof on behalf of the estate of his father, the late Grish Chunder Singh, who died on the 13th of October 1877, and he claims that such account should now be taken up to the time when a Receiver was appointed. Mr. Hill on behalf of the infant asks that an account

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should be taken to ascertain whether the minor's share of the surplus profits were credited to the minor, and also an account of the arrears of rent of the zemindaries.

The learned Advocate General on behalf of the plaintiff contends that the minor could not have asked for the account which he now seeks when the matter was referred to arbitration inasmuch as in the plaint the plaintiff only asked for accounts of the dealings with his property and of the rents issues and profits thereof respectively from the month of August 1888, and that it would be to enlarge the scope of the suit to direct such accounts for any period anterior to the month of August 1888.

It appears to me that it is not an enlargement of the scope of a partition suit to direct the accounts to be taken from a date anterior to a day named by the plaintiff for the taking of the accounts in his prayer for relief. The suit is a suit for partition and it is the duty of the Court in such a suit to ascertain and determine what are the proper accounts to be taken and over what period the accounts should extend. If the date from which the accounts were to be directed depended on the wish of the plaintiff, as expressed in the prayer of his plaint, the result would be that any party to such an action who might be aggrieved by the fixing of an improper date for the taking of accounts, would be obliged to institute a fresh suit in order to have the accounts taken for any anterior period of time.

[1020] Then it is argued that the accounts have been waived and abandoned. It appears that Indra Chunder Singh on the 17th of March 1886 filed a plaint in which the other co-owners of the Pykeparah Estates were the defendants. In this plaint the plaintiff alleged acts of waste and misappropriation of the family property on the part of Protap Chunder Singh, who was then dead, and he prayed for an account of the property which belonged to the family at the time of the death of Issur Chunder Singh, and also for an account of the dealings of Protap Chunder Singh with the property, and the rents, issues and profits thereof, and for a partition. He also among other things sought that in taking the account all sums and property which might be found to have been wasted, lost or misappropriated by Protab Chunder Singh might be debited to his share in the property. This action was withdrawn by leave of the Court on the 16th of January 1888 on terms that the plaintiff should be at liberty to institute a fresh suit only for partition of the joint properties, but not for any account of the estate or for any accumulations of income thereof for any period prior to the date of the withdrawal, the plaintiff having abandoned his claim in respect thereof. Before this order was made it had been referred to the Registrar to inquire and report whether or not the settlement was for the benefit of the minor Srish Chunder Singh and the Registrar had reported that it was for his benefit. This order is now relied upon as in effect a settlement of the accounts now sought for and as precluding the minor from seeking for an account anterior to the 16th January 1888.

I do not so construe the order. The sole matter which was referred to the Registrar for his report was whether or not it was for the benefit of the minor that a suit brought against him and others for the accounts, the nature of which I have stated should be withdrawn. For the purpose of his report upon the reference it was not necessary, I think, that the Registrar should inquire whether the minor had any cross claims against the plaintiff or to consider such claims if any before he could arrive at a conclusion upon the reference. He was not asked to consider whether it

was for the benefit of the minor that there should be a mutual abandonment of claims to account. Such a reference would have entailed much larger considerations than the matter which was referred and obviously could not be properly dealt with by the [1021] Registrar without a consideration of materials, which from his report were evidently not placed before him or considered.

I am of opinion for these reasons that the order of the 16th of January 1888 is no bar to the minor's present claim.

But then it is said that the whole course of the proceedings in this action and the conduct of the parties show that there was a waiver and abandonment by all parties including the infant of their right to an account. I fail to see how this contention can prevail in a case where a minor is concerned unless such abandonment had been sanctioned and approved of by the Court as being beneficial to the minor. No such sanction is here alleged or proved. It was merely found by the Court that it would be for the benefit of the minor that an arbitrator should be appointed for the purpose of determining all matters in difference in the suit between the parties and of effecting a partition of the joint estate, with the exception of such properties as in his opinion might be debutter or otherwise not liable to be partitioned.

But does the course and conduct of the arbitrators show that the claim to accounts was abandoned? I think not. One of the matters which counsel for the minor now asks for is an account of the arrears of rent of the zemindaries. In his award of the 24th of June 1893, I observe that the arbitrator, Sir Romesh Chunder Mitter, deals with arrears of rent. In this award he directs, among other things, that the properties mentioned in the schedule annexed thereto, marked D, together with all arrears of rent due in respect thereof up to the date of the decree to be made on the award should be allotted to Indra Chunder Singh, and that Indra Chunder Singh should hold so much of the arrears as he should actually realize or might with ordinary diligence realize in trust for himself to the extent of eight annas, for Sarat Chunder Singh to the extent of three annas, for the representatives of Poorno Chunder Singh to the extent of three annas and for Srish Chunder Singh, that is, the minor, to the extent of two annas. He deals in the same manner with the properties allotted to Sarat Chunder Singh, the representative of Poorno Chunder Singh, Srish Chunder Singh and Paddomokhee Dasi, respectively. It thus appears that the arrears of rent were by this award dealt with.

[1022] This award was remitted to Sir Romesh Chunder Mitter by an order of the 7th of August 1893, and with respect to the properties and arrears allotted to Srish Chunder Singh the award was modified and these properties and arrears were by an award of the 19th of September 1893 allotted to Indra Chunder Singh and Sarat Chunder Singh, the surviving executor of the will of Grish Chunder Singh, in trust as to the arrears for Srish Chunder Singh to the extent of two annas, and as to the balance upon trust for the other beneficiaries as thereby provided.

It may be open to doubt whether this was a satisfactory way of dealing with the arrears, but it is not open to the parties now to question the award. It has been confirmed and a decretal order passed upon it. So far as regards the arrears of rent of the partitioned properties the respective parties to whom the properties were respectively allotted must account for the arrears as trustees in an independent proceeding. Such an account cannot be obtained in this action. It may be that if a separate

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action were brought upon the award and the decree therein that action and the present action might be consolidated or dealt with at the same time. I do not see how the account of the arrears of the properties which have been already partitioned can be taken in this action unless it be by consent of all parties. It is unfortunate, I think, that the accounts were not disposed of by the arbitrators. The omission to deal with them will no doubt occasion a great expenditure of time and money.

As regards the properties which remain unpartitioned the minor is, in my opinion, clearly entitled to the accounts which he seeks. I shall direct accordingly.

As regards the income of the estate of Grish Chunder Singh, and of the minor Srish Chunder Singh of the joint properties no account has, up to the present time, been taken in this action. In my opinion he, Srish Chunder Singh, is clearly entitled to an account of the income up to the date of appointment of a Receiver and from the date of the death of his father Grish Chunder Singh in 1877.

Mr. *Mitter*.—Proceedings before the arbitrators by agreement of the parties to be taken as evidence in this case.

STANLEY, J.—Very well, the plaint in Indra Chunder Singh's **[1023]** suit and the order of the 16th of January 1888 to be treated as evidence. I shall refer it to the Registrar to take these two accounts.

I direct that such Commissioner as the parties agree upon be appointed and in default as the Court shall direct. All costs to be reserved. And then as to the costs of partition the usual rule, they shall be borne by the parties in proportion to their shares.

Infant's costs to be paid by the Receiver out of his share. Costs on scale 2 as this has been a hearing.

Mr. *O'Kinealy* asked the Court to decide the nature of the account to be taken and referred to the case of *Damodardas Maneklal* v. *Uttamram Maneklal* (1) as deciding what books, &c., it was necessary to produce when a joint family account is ordered.

STANLEY, J.—There being no objection on the part of the minor I direct that the books of account of the estate, so far as the same have been made up, shall be accepted as a statement of facts of the accounting parties, and in so far as the same have not been made up, the accounting parties shall file written statements of facts; and the minor defendant is to be at liberty to take such objections to the accounts appearing in the books of account filed by the accounting parties as he may be advised.

Attorneys for the plaintiff: Messrs. *G. C. Chunder & Co.*

Attorneys for the defendants: Messrs. *Morgan & Co.*, Messrs. *Remfry & Son*, and Mr. *N. C. Bose*.

R. G. M.

(1) 17 B. 271 (280).

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CIVIL REFERENCE.

Before Mr. Justice Ghose, Mr. Justice Rampini and Mr. Justice Hill.

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IN THE MATTER OF PURNA CHUNDER PAL, MUKHTAR.*
[15th May and 7th and 30th June, and 26th July, 1899.]

Legal Practitioners' Act (*XVIII of* 1879 *as amended by Act XI of* 1896), *s.* 13, *cl.* (*f*), 14—*Professional misconduct—Misconduct prior to enrolment as legal practitioner—"Any other reasonable cause"*—Ejusdem generis—*Permanent defect of character—"Taking instructions" and "Misconduct"—Authority of Subordinate Courts to proceed under s* 14 *of the Legal Practitioners' Act—Departmental enquiry—Legal proof.*

One *P*, a Sub-Inspector of Police, was committed for trial to the Court of Sessions on charges of bribery, forgery, and other offences, but was [1024] acquitted. He was, however, departmentally found guilty of misconduct and was dismissed from the Government service in 1891. In 1893, suppressing the fact of his dismissal, he obtained a certificate of good moral character from a pleader, and on the strength of that certificate gained admission to the mukhtarship examination which he passed, and was enrolled as a mukhtar and was practising as such for six years in the district of Bhagalpore apparently without any fault. The Sessions Judge of Bhagalpore having made a reference under s. 14 of the Legal Practitioners' Act recommending his dismissal for the aforesaid misconduct :

Held, per GHOSE, J.—The misconduct on the part of *P* being antecedent to his passing the mukhtarship examination and enrolment as a mukhtar, and consequently having no relation to his business as mukhtar, it is extremely doubtful whether such misconduct is "any other reasonable cause" for his suspension or dismissal within the meaning of s. 13, cl. (*f*) of the Legal Practitioners' Act. And it is also doubtful whether when he applied to the pleader for a certificate, *P* was bound to relate to him the past history of his life.

Per RAMPINI, J.—The misconduct of *P* constituted a "reasonable cause" for his dismissal under the provisions of s. 13, cl. (*f*) of the Legal Practitioners' Act.

Per HILL, J. (agreeing with RAMPINI, J.)—Section 13, cl. (*f*) of the Legal Practitioners' Act was intended to cover misconduct other than professional misconduct and to embrace all causes other than those previously enumerated in the section, which might reasonably be regarded as disqualifying a person for retaining the office of pleader or mukhtar. *In the matter of Gholab Khan* (1) relied on. An offence committed prior to admission may be made the foundation of proceedings under s. 13 of the Legal Practitioners' Act provided it is of such a nature as to imply a permanent defect of character of a disqualifying kind.

Held per HILL, J. (agreeing with GHOSE, J.)—That *P*, while a Sub-Inspector of Police, having been "departmentally," and not on legal proof, found guilty of misconduct, no case either for suspension or dismissal from the profession of mukhtar has been made out against him. *In the matter of the petition of Ahmeenooddeen Ahmed* (2) referred to.

Held, further, *per* HILL, J., that "taking instructions" and "misconduct" referred to in s. 14 of the Legal Practitioners' Act relate to cls. (*a*) and (*b*) respectively of s. 13 of the Act, and it is only in such cases that a Subordinate Court is authorized to proceed under s. 14. The charges in the present case not falling under either of these heads the proceedings were bad. The inquiry ought to have been held by the High Court. *In the matter of Southekal Krishna Rao* (3) referred to.

[**Diss.**, 29 A. 61 (62)=3 A.L.J. 811=26 A.W.N. 268 ; **F.**. 29 C. 890 (F.B.) ; 26 M. 448 (450)=13 M.L.J. 65 ; 11 Cr. L.J. 615 (617)=8 Ind. Cas. 282=6 N.L.R. 129 ; **R.**, 4 C.L.J. 229 (230)=10 C.W.N. 1059 ; 11 C.L.J. 164=11 Cr. L.J. 214=5 Ind. Cas. 727 ; 166 P.L.R. 1901 ; **D** , 11 Cr. L.J. 148 (149)=4 Ind. Cas. 1022= 31 P.W.R. 1909, Cr.]

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* Civil Reference, No. 2 of 1899, made by C.M.W. Brett, Esq., Sessions Judge of Bhagalpore, dated February 2, 1899.

(1) 7 B.L.R. 179. (2) 6 W.R. Mis. 5. (3) 15 C. 152=14 I.A. 154.

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[1025] THIS was a reference made by the Sessions Judge of Bhagalpore under s. 14 of the Legal Practitioners' Act (XVIII of 1879 as amended by Act XI of 1896), on a report of the Sub-Divisional Magistrate of Madhipura recommending the dismissal for misconduct of Purna Chunder Pal, a mukhtar, practising in the Court of the Sub-Divisional Magistrate, in the following terms:—

"It appears that Babu Purna Chunder Pal was enrolled as mukhtar on the 17th July 1893 after passing the mukhtarship examination in 1893. Prior to the examination he produced, as required by the rules of the High Court, a certificate of good moral character which was given to him by a pleader, Babu Mon Mohun Ghose, and on the strength of that certificate he was admitted to the examination.

"It has been satisfactorily proved and is admitted by Purna Chunder Pal that, prior to 1891 he was serving as a Sub-Inspector in the Bengal Police force, and that on the 11th September 1891 when serving as a Sub-Inspector in the District of Durbhanga he was dismissed from Government service for misconduct. That fact he appears to have concealed from the pleader Babu Mon Mohun Ghose, and by such concealment he obtained from the pleader a certificate which otherwise would not have been given; and by means of such certificate he obtained admission to the examination.

"The Magistrate appears to hold that this conduct on the part of Babu Purna Chunder Pal amounted to grossly improper conduct in discharge of his professional duty (s. 13 of the Legal Practitioners' Act, cl. 6). As however Babu Purna Chunder Pal had not then been enrolled as a mukhtar his conduct cannot, I think, be taken as falling under that clause.

"In my opinion, however, his case properly falls under cl. (*f*) of the same section. It appears from a reference to the proceedings ending in his dismissal that he was dismissed for conniving, with a Court Sub-Inspector at Durbhanga, at systematic frauds in connection with release on improper security of convicted bad characters. It is true that he had previously been acquitted by the Sessions Court after being committed for trial on charges of forgery and other offences which he was said to have committed in those transactions, but this fact was considered at the time of his dismissal. Babu Purna Chunder Pal by concealment of his previous history obtained the certificate of good moral character from Babu Mon Mohun Ghose while that pleader was practising at Alipur, and by means of the certificate, thus improperly obtained, he gained admission to the examination. Without such a certificate he could not have presented himself for examination. This conduct on his part appears to me to be a reasonable cause for the dismissal of Babu Purna Chunder Pal from his employment as a mukhtar.

[1026] "In the written defence which he submitted he did not appear to answer the charge before the Magistrate. Babu Purna Chunder Pal said that Babu Mon Mohun Ghose was aware of his dismissal from Government service when he gave the certificate. This, however the pleader has denied."

On the 15th of May 1899 the reference came on for hearing before GHOSE and RAMPINI, JJ.

Babu *Digamber Chatterjee* and Babu *Khetra Mohun Sen* for Purna Chunder Pal.—The provisions of ss. 13 and 14 of the Legal Practitioners' Act have no application to this case. The words "any other reasonable cause" in s. 13, cl. (*f*) of the Act mean any other misconduct of the nature

referred to in that section, *i.e.*, professional misconduct while practising as a pleader or a mukhtar. The certificates granted to him by the officer before whom he has practised, since he passed as a mukhtar in 1893, show that he has not in any way misconducted himself while practising his profession.

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Cur. adv. vult.

1899, June 7. The following judgments were delivered by the Court (GHOSE and RAMPINI, JJ.) that first heard the case.

JUDGMENTS.

GHOSE, J.—This is a reference by the Sessions Judge of Bhagalpore under s. 14 of the Legal Practitioners' Act (XVIII of 1879 as amended by Act XI of 1896), recommending that a certain mukhtar, Purna Chunder Pal, who had been practising as a mukhtar in the Criminal Courts, should be dismissed. The grounds for this recommendation are that the mukhtar was dismissed in 1891 from the office of Sub-Inspector of Police, which he then held, for gross misconduct; and that in 1893, he procured a certificate of good moral character from a pleader, Babu Mon Mohun Ghose, by concealing his previous history, and by means of that certificate, thus improperly obtained, he gained admission to the examination for mukhtars. The Sessions Judge considers that this is "any other reasonable cause" within the meaning of s. 13, cl. (*f*) of the Legal Practitioners' Act, for which the mukhtar is liable to be dismissed.

The questions which arise upon this reference are: (1) whether the reason assigned is "any other reasonable cause" within the meaning of s.13; (2) whether in the circumstances of the case, Purna Chunder Pal should either be dismissed or suspended.

[1027] Section 13 of the Legal Practitioners' Act, as it originally stood, before certain amendments were made in 1896 which I shall presently notice, was as follows (omitting the last portion which is not material in the present case): "The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader holding a certificate as aforesaid who takes instructions in any case except from the party on whose behalf he is retained, or a private servant of such party, or some person who is the recognized agent of such party within the meaning of the Code of Civil Procedure, or any pleader or mukhtar holding a certificate as aforesaid who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or for any other reasonable cause."

It will be observed that the words "or for any other reasonable cause" immediately followed the expression "grossly improper conduct in the discharge of his professional duty."

Section 36 of the Act laid down touting for legal business, and payment of any gratification for procuring such business, to be offences, for which the offender was liable to imprisonment or fine. It ran as follows: Whoever commits any of the following offences:—(*a*) Solicits or receives from any legal practitioner any gratification in consideration of procuring or having procured his employment in any legal business; (*b*) retains any gratification out of remuneration paid or delivered or agreed to be paid or delivered to any legal practitioner for such employment; (*c*) being a legal practitioner, tenders, gives or consents to the retention of any gratification for procuring or having procured the employment in any legal business of himself or any other legal practitioner, shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both."

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In 1896, the Legislature thought it proper to amend the Act. By Act XI of that year, they, among some other matters, rescinded s. 36 and incorporated in s. 13 the several cases of misconduct in a pleader or mukhtar, as falling within that section. Section 13 now runs as follows: "The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid; (*a*) who takes instructions in any case except from the party on whose behalf he is retained, or some [1028] person who is the recognized agent of such party within the meaning of the Code of Civil Procedure, of some servant, relative or friend authorized by the party to give such instruction, or (*b*) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or (*c*) who tenders, gives or consents to the retention, out of any fee paid or payable to him for his services of any gratification for procuring or having procured the employment in any legal business of himself or any other pleader or mukhtar, or (*d*) who, directly or indirectly, procures or attempts to procure the employment of himself as such pleader or mukhtar through or by the intervention of, any person to whom any remuneration for obtaining such employment had been given by him, or agreed or promised to be so given, or (*e*) who accepts any employment in any legal business through a person who has been proclaimed as a tout under s. 36, or (*f*) for any other reasonable cause." The Legislature evidently considered that touting for any legal business or the payment of any gratification for such business on the part of a pleader or mukhtar, ought not to be regarded as an offence; and that it should be regarded as professional misconduct or unprofessional conduct.

It will be observed that while amending the Act of 1879 the Legislature did not think it necessary to amend s. 14, which lays down the procedure to be followed in case of misconduct in a practitioner in a Subordinate Court; and the words in the first paragraph of that section are "or with any such misconduct as aforesaid"—referring to the misconduct as laid down in s. 13.

The question here arises whether, when the Legislature in s. 13, after enumerating several particular cases of professional misconduct or unprofessional conduct, use the words "or for any other reasonable cause," they use them as meaning something *ejusdem generis* with the cases of professional misconduct or unprofessional conduct, as specifically enumerated therein—or is it intended to apply to any improper act, be it either professional or otherwise, and occurring before or after the enrolment of a person as a pleader or mukhtar.

In construing the words of a statute, the rule that is ordinarily followed is that when general words follow particular words of [1029] the same nature, they are presumed to be restricted to the same genus as those words, unless it can be seen from an inspection of the scope of the legislation that the general words were meant in a wider sense (see Maxwell on the Interpretation of Statutes, pp. 469, 475).

The misconduct on the part of Purna Chunder Pal was antecedent to his passing the mukhtarship examination and enrolment as a mukhtar, and consequently had no relation to his business as a mukhtar. And it seems to me that, if the said rule of construction be followed, it is extremely doubtful whether such misconduct is "any other reasonable cause" within the meaning of s. 13. I doubt whether the Legislature ever intended to provide for a case like this. The man, according to the rules framed by the High Court, appeared at the examination, passed the examination, and was duly enrolled. The fact of his having procured a certificate of

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good moral character by concealing his previous history, and thereby having obtained admission to the examination may be a ground for cancelling his examination, and the certificate granted to him, and thereby disqualifying him from practising as a mukhtar (see s. 10) but I doubt whether he could be for this reason dismissed or suspended under s. 13 of the Act.

As bearing upon this question, I desire to refer to s. 12 of the Act, which lays down that a pleader or mukhtar "holding a certificate issued under s. 7 may be suspended or dismissed, if he is convicted of any criminal offence implying a defect of character which unfits him to be a pleader or mukhtar as the case may be." This could only refer to a conviction subsequent to his enrolment as a pleader or mukhtar.

I observe that the marginal note to s. 13 of the Act, as published in the Official Gazette, is "suspension and dismissal of pleaders and mukhtars guilty of unprofessional conduct;" and to s. 14, it is "procedure when charge of unprofessional conduct is brought in subordinate Court or Revenue Office." It is however doubtful whether in construing the meaning of the sections, we could refer to such marginal notes. And I therefore base my judgment upon the words of the sections themselves.

Passing then to the question whether Purna Chunder Pal [1030] obtained a certificate of good moral character from the pleader, Babu Mon Mohun Ghose, by concealment of the fact of his having been dismissed for misconduct, I observe that there is a conflict between the statement of the mukhtar, and that of the pleader. Purna Chunder was dismissed in 1891, and the certificate was obtained in 1893. The mukhtar says in his verified petition, that the fact of his dismissal was known at the time to the pleader, while the pleader denies such knowledge. If the pleader knew Purna Chunder so well in 1893, as to be able to certify that he was a person of good moral character, it may well be presumed that he was aware of his having been in Government service, and dismissed from that service. I am not, however, prepared to say that the pleader has spoken an untruth; but the question is whether it is so certain that what the mukhtar says is absolutely untrue. I should say that, to my mind, it is not so certain. In the next place, I doubt whether, when he applied to the pleader for a certificate, Purna Chunder Pal was bound to relate to him the past history of his life. If the certificate of the pleader be accepted, he knew him well (for he was able to certify that Purna Chunder bore a good moral character)—and, in this circumstance, a relation to him of Purna Chunder's past history was unnecessary. For these reasons, I am unable to hold that Purna Chunder obtained the certificate in question by concealing the fact of his dismissal for misconduct.

I now turn to the circumstances under which Purna Chunder was dismissed. Referring to the proceeding of the District Magistrate of Bhagalpore, dated the 12th August 1891, it appears that Purna Chunder held the office of Sub-Inspector of Police, and was committed to the Sessions for trial on several counts, *viz.*, "taking illegal gratification in respect of an official act, abetment of forgery, abetment of fabrication of false evidence and forgery"—offences which it was stated he had committed in connection with his office as Sub-Inspector. He was tried and acquitted, because the Sessions Judge found that the evidence for the prosecution was "altogether tainted and unreliable." The District Magistrate, however, held a departmental inquiry and "going back to the initial stage of the proceedings," and proceeding upon certain facts

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which he thought "were accepted as proved by the [1031] Judge," he was of opinion that "the whole of the facts point so conclusively to connivances at systematic fraud in manipulating the documents designed to procure the release of bad characters on the part of Purna Chunder Pal," and that therefore he was unfit to be retained in Government service. Unfortunately we have not before us the judgment of the Sessions Judge, the whole of the record having been destroyed. We are not therefore in a position to say whether the District Magistrate took a correct view of the facts as were to be gathered from the judgment of the Sessions Judge. So far, however, as the proceeding of the Magistrate itself is concerned, it strikes me that he found Purna Chunder Pal guilty of very nearly (though not perhaps precisely) the same offences for which he was tried and acquitted by the Sessions Judge.

The fact, however, remains that the man was departmentally found guilty of misconduct and dismissed, and he is not now in a position to contradict the facts upon which the order of the Magistrate was based.

We have, on the other hand, the fact that since his passing the mukhtarship examination, Purna Chunder Pal has been practising for about six years as a mukhtar, apparently without any fault; and the learned vakil who appeared before us, read to us certificates granted to him by certain officers before whom he has practised. And it seems to me that it would be rather hard to dismiss him altogether. I should think that, if his misconduct antecedent to his passing the mukhtarship examination comes within the scope of s. 13 of the Legal Practitioners' Act, suspension from practice for a year would perhaps meet the requirements of the case.

There being however a difference of opinion between my learned colleague (RAMPINI, J.) and myself in this reference, the matter will have to be referred to a third Judge. Let the case be placed before the Chief Justice for orders.

RAMPINI, J.—This is a reference by the District Judge of Bhagalpore under the Legal Practitioners' Act. He recommends that a mukhtar, named Purna Chunder Pal, be dismissed on the following grounds: (1) that in 1891 he was dismissed from the Police for misconduct and gazetted out of the service; [1032] (2) that in 1893, when he desired to appear at the mukhtarship examination, he suppressed the fact of his having been dismissed from the Police and so induced a pleader of Alipore, Babu Mon Mohun Ghose, to give him a certificate of good moral character which the pleader would not have done if he had known that Purna Chunder Pal had been dismissed from the Police, and without which certificate Purna Chunder Pal could not have appeared at the examination.

About the facts of the case, there can be no doubt. Purna Chunder Pal was formerly Court Sub-Inspector at Durbhanga. He was tried by the Sessions Judge for taking bribes, and for forgery and abetment of the fabrication of false evidence, but was acquitted. A departmental inquiry was then held into his conduct in respect of other matters, and he was dismissed for systematic fraud in manipulating documents calculated to procure the release of bad characters on improper security. His dismissal was notified in the *Police Gazette*. In 1893 he went to Babu Mon Mohun Ghose and induced him to give him a certificate of good character. Babu Mon Mohun Ghose distinctly says, Purna Chunder Pal never told him anything of his past history, that he was not aware of it and would never have given him the certificate, if he had known of it.

I therefore consider that Purna Chunder Pal should be dismissed as a mukhtar under s. 13, Act XVIII of 1879. Under cl. (*f*) of that section we have power to dismiss a mukhtar "for any other reasonable cause." The misconduct of the mukhtar in the above two particulars in my opinion constitutes a reasonable cause for his dismissal.

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The pleader who appears for Purna Chunder Pal argues that the words "any other reasonable cause" in s. 13, cl. (*f*) mean any other misconduct of the nature referred to in the section, that is, misconduct as a mukhtar. But I see no reason to think that the words are limited in this manner. On the contrary, in my opinion they are intended to give this Court the widest discretion in the matter.

The pleader for the appellant further urges that Purna Chunder Pal has not misconducted himself since he passed as [1033] a mukhtar in 1893. That may be so, but I consider that his past history shows him to be unfit to be a mukhtar. I would, therefore, dismiss him under s. 13 as recommended by the Judge.

[The Judges (GHOSE and RAMPINI, JJ.) having differed in opinion the case was referred to HILL, J., under s. 575 of the Code of Civil Procedure.]

1899, June 30. Mr. *Pugh*, Babu *Digamber Chatterjee* and Babu *Khettra Mohun Sen*, for Purna Chunder Pal, at the re-hearing of the case.

Cur. adv. vult.

JUDGMENT.

1899, July 26. HILL, J.—This case has been referred to me for my opinion by order of the Chief Justice under s. 575 read with s. 647 of the Code of Civil Procedure, the learned Judges composing the Bench which dealt with it having differed in opinion.

The case arises out of proceedings taken against a mukhtar, named Purna Chunder Pal, under s. 14 of the Legal Practitioners' Act, 1879, as amended by Act XI of 1896, and the learned Judges have differed, not only as to the applicability of the Act under the circumstances of the case, but also as to the punishment which, if it be taken that the Act is applicable, ought to be inflicted upon the mukhtar. Mr. Justice RAMPINI being of opinion that the Act applies and that the proper punishment is dismissal, while Mr. Justice GHOSE considers that the Act is not applicable, and that, even if it were applicable (as I have his authority for saying), the case is not one which should be visited with any punishment.

It appears from such materials as are to be found in the records of the case that Purna Chunder Pal was at one time a member of the Bengal Police, and that from the year 1883 to 1891, he filled the office of Court Sub-Inspector. In the latter year, suspicion fell upon him of complicity in certain frauds in connection with bad livelihood cases, and, after an inquiry by the Magistrate of the District, he was suspended on the 18th May 1891 and committed for trial to the Court of Sessions. The records of this trial have been destroyed, but the nature [1034] of the charges preferred against him, as well as the result of the trial, may be gathered from a proceeding held departmentally on the 12th August 1891 by the Magistrate of the district. From this it would appear that the charges embraced the taking of an illegal gratification in respect of an official act, abetment of forgery, and abetment of the fabrication of false evidence and forgery. It also appears that Purna Chunder Pal was acquitted on all these charges, the Sessions Judge considering "the evidence of the approver and the witnesses brought forward by him altogether

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tainted and unreliable." These are the words of the District Magistrate and, as he had at the time the judgment of the Sessions Judge before him, they no doubt accurately represent the view of the evidence taken by the latter. The acquittal of Purna Chunder Pal took place on the 23rd June 1891 and, in the following August, the Magistrate of the District, as his departmental superior, took up the question whether he should be reinstated in office or dismissed, there being in his opinion no middle course, and that was the occasion of the proceeding referred to above. So far as appears, no notice was given to Purna Chunder Pal of this proceeding, nor does it appear that he was called upon for any explanation or was heard in his own defence by the Magistrate during the course of the proceeding, and the materials upon which the Magistrate formed his opinion, so far as can be gathered from his order, were the judgment of the Sessions Judge and "the facts which the inquiry disclosed," by which I understand the inquiry held by Magistrate prior to the committal of Purna Chunder Pal to the Court of Sessions for trial. With these materials before him, the Magistrate came to the conclusion that Purna Chunder Pal had been guilty of conduct which rendered him unfit to be retained in the service of Government, and he accordingly dismissed him from the Police. The order of dismissal is dated the 12th August 1891.

It hardly seems necessary to examine in much detail the grounds of the Magistrate's order. He believed, however, that Purna Chunder Pal had been "mixed up with a systematic practice of obtaining the release of persons ordered to find security on bogus security or by false personation." This conclusion was founded on the following considerations, putting them generally. [1035] One Khuda Bux who had signed certain petitions in connection with the cases in question as the identifier of the petitioners had stated that he had so signed by the direction of Purna Chunder Pal and at his lodging. That a pleader of the Munsif's Court who admitted having written the petitions was a relative of Purna Chunder Pal and lived at his lodging at the time when the petitions were written. That this pleader had sprung into a regular practice in bad livelihood cases, a circumstance only to be rationally accounted for by the fact that he was a relation of the Court Sub-Inspector, and lastly, that this same pleader had twice "telegraphed to the Sub-Inspector, to return," though at what particular time does not appear.

It may be here remarked that Khuda Bux was the "approver" whom the Sessions Judge had declined to believe on the trial of Purna Chunder Pal and with reference to whom the Magistrate in the introductory part of the order now under consideration observes:—"There is no doubt that Khuda Bux, who had an idea that his own safety depended on the conviction of the accused (Purna Chunder Pal), did tutor witnesses and introduce a quantity of matters as to the evidence for the prosecution which was clearly false."

Then the Magistrate goes on to comment on the case of one Maharaj Singh, who had been committed to the Court of Sessions but not yet tried. What the precise charge was in Maharaj Singh's case is not stated, but it appears that he had signed a petition in a security case signing his own name and the name of one Bechu Kaout, but the latter without authority. Maharaj Singh is said first to have confessed, then to have withdrawn his confession; and lastly, "after Khuda Bux had given his evidence," to have stated (under what circumstances however does not appear) that he had paid some money to the Court Sub-Inspector for procuring the release of bad characters, describing in detail how the sum was made up and stating

further that "all the transactions took place at the Court Sub-Inspector's lodging." Then the Magistrate remarks that, whatever credence may be given to the statements of Maharaj Singh, there could be no doubt that the Court Sub-Inspector had a lively dread of what he might say if driven into a corner, because, when a warrant **[1036]** was issued and Maharaj Singh was arrested and committed to jail, the Court Sub-Inspector interested himself to get him released on bail to the extent of paying Rs. 40 to a mukhtar to stand security. Lastly, the Magistrate refers to certain petitions relating to the release of bad characters and the reinstatement of chowkidars written by the Munsif's Court pleader already mentioned and witnessed by one Gopal Panda, a peon attached to the Court Sub-Inspector's office and who lived with the Court Sub-Inspector in his private lodging. Whether there is anything incriminating about these petitions is, however, not stated.

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In one of the concluding paragraphs of the order, the Magistrate goes on to express his sense of how unfortunate it was that all these facts had not been so placed before the Court of Session as to secure the conviction of Purna Chunder Pal, but he observes seemingly in extenuation,—"A Criminal Court cannot perhaps permit itself to act upon what we call moral conviction."

In 1893, Purna Chunder Pal having obtained a certificate of good character from a pleader named Mon Mohun Ghose presented himself for the mukhtarship examination which he passed, and he was duly admitted to practise as a mukhtar. He was afterwards enrolled in the District of Bhagalpore and practised in the Court of the Sub-Divisional Magistrate of Madhipura. From the time of his admission down to the present he has apparently conducted himself with professional propriety and holds certificates of a satisfactory kind from Magistrates in whose Courts he has practised.

The present proceedings were initiated by the District Magistrate of Bhagalpore on the 23rd July 1898 It appears that he was then informed by the District Superintendent of Police of the antecedents of Purna Chunder Pal, and he thereupon charged him with misconduct under s. 13 of the Legal Practitioners' Act, and directed the Sub-Divisional Magistrate of Madhipura to try him. The charges preferred by the District Magistrate were two-fold, namely, (1) that Purna Chunder Pal had committed misconduct by withholding from the District Judge (whose duty it is to satisfy himself of the sufficiency of the certificates of character presented by mukhtarship candidates) the fact of his having been dismissed from the Police, **[1037]** and (2) that he had, in fact, been dismissed from the Police, which latter fact the District Magistrate regarded as reasonable cause under s. 13, cl. (*f*) of the Legal Practitioners' Act for his dismissal as a mukhtar. The District Magistrate, in forwarding the case to the Sub-Divisional Magistrate, directed him to "restrict the inquiry carefully to the matter of the charge."

As the result of the inquiry which followed, the Sub-Divisional Magistrate found that Purna Chunder Pal had withheld the fact of his dismissal from the Police both from Babu Mon Mohun Ghose, who had certified to his character, and from the District Judge and further, that he had, in point of fact, been dismissed from the Police, and he recommended his dismissal.

The case was then referred through the usual channels to this Court with the result which has been already mentioned.

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The first question which presents itself is, as it is formulated in the opinion of Mr. Justice Ghose, whether the words of s. 13, cl. (*f*) of the Legal Practitioners' Act are used as meaning something *ejusdem generis* with the case of professional misconduct or unprofessional conduct as specifically enumerated in the section or are they intended to apply to any improper act, be it either professional or otherwise, and occurring before or after the enrolment of a person as a pleader or mukhtar? In the opinion of Mr. Justice Ghose, the more limited interpretation is the correct one, the improper act must be one of professional misconduct, and the application of the section must, therefore, be confined to misconduct occurring after admission as a pleader or mukhtar has taken place. Mr. Justice RAMPINI is of the contrary opinion. With every deference I venture to think that Mr. Justice GHOSE has perhaps pressed the *ejusdem generis* doctrine somewhat too far. Each of the clauses of s. 13 which precedes cl. (*f*) seems to me to be generically distinct from the rest, and to be exhaustive of its own genus, and, where this is so, I think the principle of *ejusdem generis* can hardly apply. In my judgment cl. (*f*) was intended to cover misconduct other than professional misconduct and to embrace all causes other than those previously enumerated in the section which might reasonably be regarded as disqualifying a person for retaining the office of pleader or mukhtar, and, in this view **[1038]** I am, I think, supported by the case of *In the matter of Gholab Khan* (1), a case decided under the corresponding provisions of the "Pleaders, Mukhtars and Revenue Agents Act, 1865" (Act XX of 1865).

With respect to the further question whether cl. (*f*) was intended to apply to improper conduct occurring before admission, I feel greater doubt. If the act of misconduct be viewed apart from what it implies, it would be difficult perhaps to say that cl. (*f*) could apply to it if it took place prior to admission, but I think that s. 13 was intended to provide for causes disqualifying a person for retaining the office of pleader or mukhtar, and that a moral defect of character may be one of such causes. It is on the ground of moral defect of character that the High Court is empowered to act under s. 12 when a conviction of a criminal offence has been had. If a person is proved to be morally unfit to be a pleader, it would seem to be not unreasonable that he should be dismissed from the office, at whatever time the moral defect may have had its origin or first disclosed itself, and in this sense I think that an offence committed prior to admission may be made the foundation of proceedings under s. 13, provided it is of such a nature as to imply a permanent defect of character of a disqualifying kind. If it were otherwise, there would be no machinery provided by the Act for the dismissal of a practitioner, however heinous a criminal he might be. if only his crime had been committed previous to his admission—a conclusion I should feel reluctant to admit unless there were no escape from it.

On these questions, therefore, I venture to think the view taken by Mr. Justice RAMPINI was the correct one.

Turning, however, to the merits of the case, I confess I am unable to find, on the materials before me, justification for the dismissal or suspension of Purna Chunder Pal. It is important to bear in mind what precisely were the charges preferred against him and which he was called upon to answer. The first was that he concealed from the Judge the fact of his dismissal from the Police, and the second, the fact that he had been

(1) 7 B.L.R. 179.

dismissed from the Police, and, as has already been observed, the Sub-Divisional Magistate was [1039] directed to confine his inquiry strictly to these charges. A copy of the letter, moreover, containing the District Magistrate's direction to this effect was served on Purna Chunder Pal for the purpose of informing him of the charges which he had to meet.

With respect to both these charges, the Sub-Divisional Magistrate has found against Purna Chunder Pal. As to the first, however, there is not an *iota* of evidence upon the record nor does the Magistrate state his reasons for his finding. Somewhat curiously the question whether Purna Chunder Pal had concealed his antecedents from the pleader who certified to his character was the only one to which the Magistrate really seems to have devoted his attention. But that question was not before him. The second charge was proved by the evidence of a police-officer and was indeed admitted by Purna Chunder Pal, who suggested an explanation of his dismissal, which may be a sufficient or insufficient explanation; but, at all events, the Sub-Divisional Magistrate has expressed no opinion as to its merits; so that it comes to this that the first charge has been found to be established in the absence of all evidence in support of it, and the second charge has been established by evidence as well as by Purna Chunder Pal's own admission.

With respect to the first charge, I feel myself unable under the circumstances to affirm the recommendation of the Sub-Divisional Magistrate, and this charge must, in my judgment, be put out of view altogether. There are no materials upon the record to enable one to pronounce an opinion as to its truth or falsehood, and it seems to me, therefore, unnecessary to express any opinion on the question whether, if it had been properly established, it would have afforded reasonable cause for either the dismissal or suspension of Purna Chunder Pal.

The question, however, remains whether he ought to be dismissed or suspended in consequence simply of his dismissal from the Police, and this question ought, I think, to be answered in the negative.

Regarding this charge in its strictness and as it has been dealt with by the Magistrate who held the inquiry, it would be sufficient, I think, to justify that answer if one were to say that [1040] the reasons which would warrant a dismissal from the police might well fall far short of, or differ from those which would warrant dismissal from the profession of mukhtar; and perhaps, in strict fairness to Purna Chunder Pal, one ought not to go behind the precise charge which was formulated against him, for he was not called upon to say anything one way or the other as to the correctness of the facts and inferences arrived at by the Magistrate who dismissed him, and on the strength of which his dismissal took place. But if one is at liberty to go behind the charge and to treat the offences found by the District Magistrate in his order of dismissal as if they constituted the subject-matter of the present charge, can it be justly said that they have now been established, as the Act requires, by evidence? or are we to accept as evidence, for the purpose of a proceeding which, it is to be remembered, involves the possibility of depriving a person belonging to a respectable profession of the means of gaining a living, the opinions of the Head of a Department formed without taking evidence in the presence of the person affected and without hearing him, and formed, moreover, in the teeth of the opinion to the contrary of the highest judicial tribunal of the District? For my own part I have no hesitation in answering these questions in the negative. I do not for a moment mean to suggest that the District Magistrate may not have been "departmentally" correct, in his action.

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One has, however, but to glance at the reasons assigned by him for his conclusions in order to estimate the value of the evidence on which he proceeded, and, in the present matter at all events, we have, I think, to deal with legal proof and not with the "moral convictions" of the Magistrate.

On this branch of the case, then, I agree with Mr. Justice Ghose in thinking that no case either for dismissal or suspension has been made out against Purna Chunder Pal. I would only refer, further to the judgment of the late Chief Justice, Sir Barnes Peacock, in the case of *In the matter of the petition of Ahmeenooddeen Ahmed* (1), a case in many respects resembling the present, in which the learned Chief Justice clearly indicates the principles which ought to govern such a proceeding as this. His [1041] remarks, I think, fully bear me out in the view of the matter which I have taken.

I wish, however, to add that what I have now said proceeds on the assumption that this Court is properly *seized* of the case—a matter as to which I entertain considerable doubt. Section 13 of the Legal Practitioners' Act authorizes the High Court, after such inquiry as it thinks fit, to suspend or dismiss a pleader or mukhtar for any of the causes specified in the section, but the power of subordinate Courts is much more restricted. Section 14 deals with that power and provides that, if a pleader or mukhtar practising in any subordinate Court is charged in such Court with "taking instructions as aforesaid" or "with any such misconduct as aforesaid," the presiding officer shall send him a copy of the charge and also a notice that, on a day to be appointed therein, such charge will be taken into consideration; and then follow directions as to the procedure to be adopted in the matter. The taking of instructions, and misconduct here referred to, relate to cls. (*a*) and (*b*) respectively of s. 13 [see *In the matter of Southekal Krishna Rao* (2)] and it is only in such cases that a subordinate Court is authorized to proceed under s. 14. The charges in the present case do not fall under either of these heads, and it seems to me therefore, that the proceedings are bad. The inquiry ought, I think, to have been held by the High Court.

In the result I think that Purna Chunder Pal ought to be acquitted and it is so ordered.

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27 C. 1041 (F.B.)=4 C.W.N. 645.

FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Rampini, and Mr. Justice Handley.

NEMAI CHATTORAJ *v.* QUEEN-EMPRESS.* [4th and 9th June, 1900.]

Kidnapping—Kidnapping from lawful guardianship—Completion of such offence—Whether a continuous offence—Constructive possession—Penal Code Act (XLV of 1860), *ss.* 360, 361 *and* 363.

[1042] *J*, a minor girl, was taken away from her husband's house to the house of *R* and there kept for two days. Then one *M* came and took her away to his own house and kept her there for twenty days, and subsequently clandestinely

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* Full Bench Reference on Rule, No. 123 of 1900, against the order of K. N. Roy, Esq., the Officiating Sessions Judge of Bankura, dated the 13th December 1899.

(1) 6 W.R. Mis. 5.

(2) 15 C. 152=14 I. A. 154.

removed her to the house of the petitioner, and from that house the petitioner and *M* took her through different places to Calcutta. The petitioner was convicted under s. 363 of the Penal Code for kidnapping a girl under 16 years of age from the lawful guardianship of her husband. *Held* (by the majority of the FULL BENCH) that the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offenders in taking the girl to Calcutta, and that the petitioner, therefore, could not be convicted under s. 363 of the Penal Code.

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Held, further that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship; it is not an offence continuing so long as she is kept out of such guardiaship.

Per RAMPINI, J.—The offence of kidnapping under s. 363 is not necessarily or in all cases complete as soon as the minor is removed from the house of the guardian; when the act of kidnapping is complete is a question of fact to be determined according to the circumstances of each case.

[F., 26 M. 454 (455) = 2 Weir 296; R., 15 C.P.L.R. 185 (187); 12 Cr.L.J. 94 (97) = 9 Ind. Cas. 511 (513) = 56 P.L.R. 1911; 14 Cr. L. J. 93 (94); 14 Cr.L.J. 439 = 20 Ind. Cas. 599 = 7 S.L.R. 17; 18 Ind. Cas. 652 (654) = 14 Cr.L.J. 93 = 15 O.C. 351.]

ON the 20th July 1899 the complainant missed his wife named Johura, aged about 11 or 12 years, from his house. It appeared that the girl was taken from her husband's house to the house of a man called Rambandhu a mile away. Here she was kept for two days and then one Mohendro came and fetched her away to his house where she was kept for twenty days. One night she was removed from there and taken to the house of the petitioner, Nemai Chattoraj, eight miles away from that of Mohendro. Nemai and Mohendro then took her by stages to Calcutta. Here they met a man Surji who took them to the house of Lukshi, a prostitute, who let rooms. The girl was palmed off as a relative of both Mohendro and Nemai, and her name was given as Shoshi. The girl was found crying by a lodger, Giribala, and she then stated that her real name was Johura, and that she had been brought down on the pretence of bathing in the sacred Ganges; that she had been kept confined by Mohendro; and that she was married, and was not related to the two men, who now wanted her to live with a Babu. Upon hearing this story Lukshi and the male lodgers of the house took steps to prevent Mohendro and Nemai from having access to her. Mohendro then lodged a complaint at the Kumartoli Thana in Calcutta to the effect that a girl of his village, aged about 12, had come to Calcutta with him and Nemai, in order to go to a relation of hers, and that [1043] Lukshi had detained her. The Police went to the house and the girl repeated her story to them. This led to the arrest of Mohendro and Nemai. The two accused and the girl were taken before the Calcutta Magistrate, who directed the transfer of the case to Bankura. The accused were convicted on the 29th of September 1899 by the Deputy Magistrate of Bankura under s. 363 of the Penal Code of the offence of having kidnapped a minor girl from lawful guardianship, and sentenced each of them to two years' rigorous imprisonment.

The accused appealed to the Sessions Judge of Bankura, who affirmed the conviction, but reduced the sentence. A rule was granted by the High Court against the decision of the Sessions Judge. The rule came on for hearing before PRINSEP and STANLEY, JJ., on the 3rd of April 1900, who made the following reference to the Full Bench :—

"Nemai Chattoraji has been convicted under s. 363, Penal Code, of kidnapping Johura, the wife of Gopal Singh, and aged 11 or 12 years of age, from the lawful guardianship of her husband. There is no evidence that he was a party to the taking away of this girl under false pretences that she was being taken to her mother; but there is evidence

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that while she was being taken to Calcutta for the purposes of making her lead the life of a prostitute Nemai joined in promoting this purpose, and was one of those who took her to Calcutta. She was obviously a minor, which from her appearance must have been known to him, and there is evidence which we believe that he falsely represented that she was his sister. The question arises whether he can properly be convicted under s. 363, Penal Code, of kidnapping from lawful guardianship, or whether, that offence being completed when she left the house and guardianship of her husband, he cannot under any circumstances be convicted of that offence.

The reported cases on this subject are conflicting. In *Rakhal Nikari* v. *Queen-Empress* (1), the learned Judges seem to have held that the offence "was complete when the girl was actually kidnapped" (see *per* Ghose, J. p. 82), and it would appear that they therefore considered only whether, on evidence that the **[1044]** prisoner as in this case, merely promoted the object of the kidnapping, he could properly be convicted of abetment of that offence; and the learned Judges (Ghose and Trevelyan, JJ., Rampini, J., dissenting) held that the prisoner could not properly be convicted of abetment, such abetment being after the commission of the offence. In *Reg.* v. *Samia Kaundan* (2), where the prisoner had been convicted under somewhat similar circumstances of abetment of kidnapping, the conviction was affirmed on the ground "so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted." This case, we may observe, was not before the learned Judges who decided *Rakhal Nikari* v. *Queen-Empress* (1). But it was disapproved in *Queen-Empress* v. *Ram Dei* (3) no reasons being specifically given for this opinion, and it would seem that a similar opinion was held by the learned Judges in *Queen-Empress* v. *Ram Sundar* (4). We are inclined to agree with the view of s. 363 taken in *Reg.* v. *Samia Kaundan* (2), but in this conflict of opinion we feel bound to refer the matter to a Full Bench. On receipt of an answer to this reference we propose to deal with the case on its merits."

1900, *June* 4th. Babu *Digamber Chatterji* (with him Babu *Khetter Mohan Sen*), for the petitioner :—There is no evidence on the record of any conspiracy on the part of the petitioner which led to the kidnapping of the girl, nor did he have anything to do with the taking away of the girl from the house of her guardian, and it was not till she had been kept twenty-two days away from her guardian that she was brought to the house of the petitioner, who then accompanied the party to Calcutta. I would, therefore, submit that the petitioner cannot be convicted under s. 363 of the Penal Code. The case of *Reg.* v. *Samia Kaundan* (2) is distinguishable. Section 360 of the Penal Code deals with the offence of kidnapping out of British India, s. 361 with kidnapping from lawful gauardianship, and s. 363 provides a punishment for both those offences. *Reg.* v. *Samia Kaundan* (2) was a case of abetting the kidnapping of a minor out of British India **[1045]** and the offence was not completed, but was continuous until the minor had left the shores of British India, so that there could be abetment; the kidnapping under s. 360 was not made out. That case, however, was not argued at the bar, and has not been followed in *Queen-Empress* v. *Ram Dei* (3) and *Queen-Empress* v. *Ram Sundar* (4). In *Rakhal Nikari* v. *Queen-Empress* (1), the judgments of all the three

(1) 2 C. W. N. 81. (2) 1 M. 173. (3) 18 A. 350. (4) 19 A. 109.

Judges are in the petitioner's favour, although the question raised here did not arise in that case. The girl, I submit, was out of the custody of her lawful guardian, her husband, either when she was taken to Rambandhu's house or else when she was taken to Mohendro's house. It is alleged that the girl was taken away for the purpose of selling her in marriage or for prostitution; there is however no reference in s. 361 to the destination of the minor; therefore I submit that the taking out of the keeping can be completed before the intention for which she was taken was carried out. If completion of intention was necessary the Legislature would have provided for it in s. 363.

Babu *Srish Chunder Chowdhry*, for the Crown.—The word "takes," in s. 361 of the Penal Code, is used in the sense of "removing" and that implies a continuous act. If the continuity is broken the Court must consider if the continuity is stopped by the breakage. Kidnapping is only limited by law to the violation of the guardian's right. So long as the girl had a mind to return to her husband he would, I submit, be in constructive possession of her. It is not necessary that the guardian should be in actual possession. *Reg* v. *Mycock* (1), *Reg* v. *Prince* (2), *Queen* v. *Oozeerun* (3). The taking or removal is a continuous act and if it culminates in an offence it is not completed until that offence is committed. The whole of the removal should be taken as one act, and therefore if any one joined at any time before the removal had been completed he would be guilty under s. 363. In this case **[1046]** until the intention with which she was taken to Calcutta had been carried out the offence was continuous.

Cur. adv. vult.

1900, *June* 9th. The following judgments were delivered by the Full Bench—

JUDGMENTS.

MACLEAN, C. J.—The question submitted to us by the learned Judges who referred this case is "whether the petitioner can be properly convicted under s. 363 of the Penal Code of kidnapping from lawful guardianship, or whether, that offence *being completed* when she left the house and guardianship of her husband, he cannot under any circumstances be convicted of that offence."

The question perhaps is not very happily worded, for if the offence of kidnapping were *completed* when the girl left the house, which means I suppose when,—to follow the language of s. 361,—she was taken or enticed out of the keeping of her lawful guardian without his consent, and if, as is conceded, the accused had nothing to do with the actual taking or enticing out of the keeping of the lawful guardian, and did not appear upon the scene until some three weeks after the actual taking or enticing away, and that what he then did,—according to the finding in the reference,—was to join in taking her to Calcutta for the purpose of making her lead the life of a prostitute, I fail to see how the accused could be properly convicted under s. 363. But though the question has been so framed, the case has been argued before us upon the footing that the taking or enticing was not completed when the accused joined in taking the girl to Calcutta, and that the taking and enticing out of the keeping of the guardian was a continuous act, and that the accused took part in that continuous act, and therefore is liable to conviction under the section I have mentioned. I will deal with the case on this footing.

(1) (1871) 12 Cox. 28.
(2) (1875) L. R. 2 Cr. Cas. Res. 154 (168).
(3) 7 W.R. & Cr. 96.

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Now, what is the definition of kidnapping, for we are dealing only with the question of whether the accused can be properly convicted of that offence ? Section 361 thus defines it, "Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such **[1047]** guardian, is said to kidnap such minor or person from lawful guardianship."

The question, in each case, must be whether the accused did or did not actually take or entice the boy or girl, as the case may be, out of the keeping of the lawful guardian without his consent. The question is one of fact, and must in each case be decided upon the particular evidence of each particular case. The section says "taking" or "enticing;" it does not say a word about "detaining" out of the keeping of the guardian, and when the Legislature means "detaining" it says so, as in s. 498. Upon the facts found in the reference, I do not see how the accused can be said to have taken or enticed the girl out of the keeping of her guardian : the act of taking was completed when the girl was actually taken out of the keeping of her guardian, and in this apparently, the accused had no part. He had nothing to do with the matter until three weeks later. The act of taking is not, in the proper sense of the term, a continuous act: when once the boy or girl has been actually taken out of the keeping, the act is a completed one. If continuous, it would be difficult to say when the continuous taking ceased: it could only be when the boy or girl was actually restored to the keeping of the guardian. But this would constitute not the act of "taking" but an act of "detaining." .

If for instance, I have a watch which I keep in my pocket, and some light-fingered, but not too honest, personage takes that watch out of my pocket, the moment he has actually abstracted that watch he has taken it out of my keeping, but it would be a strange thing to say that if one month afterwards some light-fingered friend of his joins him in taking this watch to a pawnbroker, the latter personage can properly be said to have taken the watch out of my keeping. He had nothing to do with the taking. No doubt in the case I have put of a watch, the act, if dishonestly done, amounts to stealing : in the case of a minor taken from the keeping of a lawful guardian it is called kidnapping.

With regard to the suggestion that, when the accused joined in the journey to Calcutta, the girl was still in the constructive keeping of her husband, there is nothing in the English cases cited which go that length. I do not see how she can be properly said to be within his constructive keeping, when she was taken from his actual keeping some three weeks previously.

[1048] I propose to deal very shortly with the cases cited. The case of *Reg* v. *Samia Kaundan* (1) was a case of kidnapping out of British India, and as, when the accused intervened, the boy had not been actually taken out of British India, the process of "taking" was regarded as still going on, or continuing, and as the accused took part in it, it was held that his case was within the section. That case does not clash with the view I have expressed above, whilst the cases in the Allahabad High Court referred to in the reference tend to support it.

I do not regard the case of *Rakhal Nikari* v. *Queen-Empress* (2) as an authority one way or the other, for the point now under discussion

(1) 1 M. 173. (2) 2 C. W. N. 81.

was not then raised : though there is, of course, the dictum of Mr. Justice Ghose which accords with my own view. In my opinion then, the question submitted to us ought to be answered in the negative.

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I am disposed to agree with Mr. Justice Rampini in doubting whether any case for a Full Bench reference properly arose in this case : but, be that as it may, as the matter has been referred, I think we were bound to express our opinion upon it.

With this expression of opinion I would remit the case to the Bench taking the criminal cases, which I think we have every power to do under Rule 5 of Chap. 5 of the appellate rules and orders.

PRINSEP, J.—This case was referred to a Full Bench by the Bench dealing with the criminal business of the High Court consisting of myself and Stanley, J. The facts showing the point referred are clearly stated to be whether the appellant who did not join in the kidnapping but joined in promoting the purpose of the kidnapping from lawful guardianship can be convicted of that offence or whether that offence being completed when the woman left the house and guardianship of her husband, the appellant cannot, under any circumstances, be convicted of that offence.

The reason for the reference to the Full Bench is stated to be that the judgment of this Court in *Rakhal Nikari* v. *Queen-Empress* (1) is in this respect opposed to that of the Madras High Court in *Reg* v. *Samia Kaundan* (2) in which we were inclined to agree.

[1049] It was with some surprise that I heard the pleader who pressed us to follow *Rakhal Nikari* v. *Queen-Empress* (1) contend before this Full Bench that that case was not in point, and that it did not decide the matter referred, for on that ground obviously this reference should not have been made. As some of my learned colleagues have also expressed that opinion, it becomes my duty to state why Stanley, J., and I referred this case.

The point under consideration in that case was whether the appellant under findings of fact exactly similar to those in the present case could properly be convicted of abetment; and it was held by Trevelyan and Ghose, JJ. Rampini, J., dissenting that he could not. The case started on the assumption that the kidnapping "was complete" "when the girl was kidnapped." Those are the words of Ghose, J., and it was because that opinion had been expressed without dissent on the part of the other Judge that we held that this view of the law was contrary to that expressed in *Reg.* v. *Samia Kaundan* (2). We noticed that that case had not been before those learned Judges, but still we considered, and I maintain justly considered, that the point now referred had been considered and determined. The learned Judges, Trevelyan and Ghose, JJ., who decided that case held that the prisoner was an accessory after the fact and not an abettor and that therefore he was not liable to punishment. If they had not held that the offence had been completed and that it was not continuing they could not have come to that conclusion. I therefore still venture to think that there were ample grounds for this conclusion on our part. If it is now otherwise held I can only say that we were misled by the terms of the judgment of Ghose, J., by the result of that case, and by the arguments of the pleader who has now taken the very unusual course of expressing the contrary view of that judgment.

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(1) 2 C. W. N. 81. (2) 1 M. 173.

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I am satisfied with the opinion expressed by my Lord the Chief Justice that the offence of kidnapping from lawful guardianship is complete when the woman is actually taken from lawful guardianship, and that it is not an offence continuing so long as she is kept out of such guardianship.

[1050] The result in this case will be that the appellant must be acquitted of that offence though he afterwards actively promoted the purpose of the kidnapping, and that unless he can properly be convicted under s. 368, Penal Code, he will be released. I venture to think that the law is defective in such a result.

The case will now be returned to the Criminal Bench for final determination whether on the evidence the appellant can be properly convicted of any other offence.

GHOSE, J.—The petitioner, Nemai Chattoraj, has been convicted under s. 363 of the Indian Penal Code, *i.e.*, for kidnapping a girl under 16 years of age from the lawful guardianship of her husband.

It is stated by the learned Judges, who have referred this case, to the Full Bench, in their referring order, that there is no evidence that the petitioner "was a party to the taking away of the girl under false pretences that she was being taken to her mother, but there is evidence that while she was being taken to Calcutta for the purpose of making her lead the life of a prostitute Nemai joined in promoting this purpose and was one of those who took her to Calcutta:" or in other words, as I understand it, that there is no evidence that he took any part, either directly or indirectly, in the taking or enticing away the girl, but that he afterwards helped the person or persons who had enticed her away, in removing her to Calcutta for the purpose of prostitution. Section 361 of the Indian Penal Code, which defines the offence of kidnapping, says: "Whoever takes or entices any minor under 14 years of age if a male or under 16 years of age if a female or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian is said to kidnap such minor or person from lawful guardianship.

It will be observed that the essence of the offence consists in *taking or enticing* away, and *not* in *keeping* the minor after such taking or enticement; so that the offence would be committed when the minor is actually taken or enticed away from the keeping of the guardian. I do not mean here to say that the offence is necessarily committed when the minor steps out of the threshold [1051] of the guardian; for her absence may be temporary, and may be capable of explanation. But so soon as she is fairly out of the control of her guardian, the offence, I take it, is committed, and I should think it is then complete.

The question, however, that has been put before the Full Bench is, whether in this case the petitioner "can properly be convicted under s. 363 of the Penal Code, of kidnapping from lawful guardianship, or whether, that offence being completed when she left the house and guardianship of her husband, he cannot under any circumstances be convicted of that offence." This question, as I understand it, presupposes that the girl did leave the guardianship of her husband before the petitioner had anything to do with her; and if that be so, the only matter for consideration is whether the act of the petitioner in joining the principal offender or offenders subsequent to the kidnapping of the girl in promoting the purpose of taking her to Calcutta, makes him guilty of the offence of kidnapping, as defined in s. 361.

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The learned Judges in referring this case to the Full Bench have relied upon the decision of the Madras High Court in the case of *Reg.* v. *Samia Kaundan* (1) where that Court in the course of their judgment, observed: "So long as the process of taking the minor out of the keeping of the lawful guardian continued, the offence of kidnapping might be abetted."

This proposition taken by itself would seem to involve the question, when was the taking away out of the keeping of the lawful guardian complete. According to the view of facts in this case, as accepted by the learned Judges who have referred this case, the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offenders in taking the girl to Calcutta; and in this view of the matter it follows that he could not have abetted the offence of kidnapping the girl.

Referring, however, to the judgment of the Magistrate which gives the facts upon which the question before the Full Bench arises—facts which have not been contested by the learned vakil for the Crown—what occurred was this; one Rajani who appears [1052] to be son of the priest of the husband's family, promised the girl that he would take her to her mother; that one evening she was taken away not however to her mother's house, but to the house of Rajani's father Rambundhu, and here she was kept for two days and then one Mohendro came and took her away to his own house and kept her there for 20 days, and subsequently clandestinely removed her to the house of the petitioner, and from that house the petitioner and Mohendro took her through different places to Calcutta. And we have been informed by the learned vakil for the petitioner that it appears on the record that Rambundhu's house is a mile distant from the house of the girl's husband, and Nemai's house is about 8 miles from Mohendro's.

Upon these facts, when was the taking away complete? It may be taken to have been complete either when she was taken to Rambundhu's house or to Mohendro's house. At any rate "the process of taking the minor out of the keeping" of the guardian was complete when she was taken from Rambundhu's to Mohendro's house, and there kept for 20 days together, without being allowed to go back to her husband's or to her mother's. If the taking away was then complete, I fail to see how, subsequent thereto, the petitioner could have committed the offence of kidnapping, when the girl was taken over to his house. What the petitioner did when she was taken by Mohendro to his house had evidently no connection with, or bearing upon the matter of taking or enticing away from the guardianship of her husband. His acts and conduct might possibly bring him within the provisions of s. 368 of the Indian Penal Code, but he cannot be brought within s. 363, unless there is some evidence (and it is conceded there is none) showing that it was at his instigation that the girl was kidnapped.

The case of *Reg* v. *Samia Kaundan* (1) was one where the offence was an attempt at kidnapping a boy out of British India, as defined in s. 360. The accused knowing that the boy had left home without the consent of his parents, at the institgation of another person, undertook to carry him to Kandy in Ceylon, and had proceeded on the way as far as Trichinopoly where [1053] he was arrested. The learned Judges of the Madras High Court held that the offence committed by the accused was one which

(1) 1 M. 173.

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fell under s. 363, read with s. 116, of the Indian Penal Code. It will be observed that s. 363 refers to two distinct offences, (1) kidnapping a person from British India without that person's consent or of some person legally authorized to consent on his behalf as defined in s. 360, and (2) kidnapping out of lawful guardianship as defined in s. 361; and that being so, the conclusion arrived at by the Madras High Court would seem to me to be correct. The learned Judges, however, in the course of their judgment made certain observations to which I have already referred. If these observations are read by the light of facts of the case and the conclusion arrived at by the Court, there is no ground to take exception thereto; for until the minor was taken out of British India, the attempt to commit the offence was being made. It was thus a continuous offence, and the offender was therefore liable to be punished for the first of the two offences mentioned in s. 363, read with s. 116, Indian Penal Code. But suppose the minor was actually taken out of British India, could it be said that any person, who joined the kidnapper in Ceylon and removed the boy from place to place or kept him in his possession, would be guilty of the offence of kidnapping out of British India, as defined in s. 360? I apprehend not; for the offence was complete when the minor was put out of British India. The whole question in a case like this is, when was the offence complete. If however the observation of the learned Judges in the Madras case be taken as applicable not only to a case of kidnapping out of British India, as defined in s. 360, but also to the case of kidnapping, as defined in s. 361, I am bound to say that I am unable to agree with them; and I observe that the case has been dissented from in two cases in Allahabad, *Queen-Empress* v. *Ram Dei* (1), and *Queen-Empress* v. *Ram Sunder* (2).

It has, however, been argued by the learned vakil for the Crown that the girl must be taken to have been in the constructive possession of her guardian even after she was removed from **[1054]** Mohendro's house to the petitioner's house, and that such constructive possession continued until the purpose which the principal offender had in view was completed, namely, until she was taken to Calcutta, and therefore the offence was a continuing one. I need hardly observe that the facts accepted by the learned Judges who referred this case to the Full Bench are contradictory to this argument; and I cannot understand how the girl could possibly be under the constructive keeping of her guardian when she was put out of his control by the acts and conduct of the principal offender, Mohendro, or Rajani, whoever he may be. Another argument that has been advanced on behalf of the Crown is that the intention of the girl to return, or not to return, to her husband is an element in the consideration of the question whether she was not, notwithstanding her removal from her husband's house, in his constructive possession. I cannot find any warrant for this construction; and I need hardly say that s. 361 of the Indian Penal Code does not contemplate such considerations.

If the offence, notwithstanding the removal of the girl from the keeping of the guardian, be regarded as continuous, how long is this to continue? It might, according to the contention on the other side, continue for years together, and any person who might have anything to do with the minor during this long interval of time in keeping her out of the way, or in his possession, would be punishable under s. 363; and this could not obviously be maintained.

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(1) 18 A. 350.

(2) 19 A. 109.

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Reference was also made, by way of analogy, to the offence of breach of trust; and it has been said that in the same way that such an offence is continuous, the offence of kidnapping should also be taken to be continuous. But it will be observed, referring to the definition of criminal breach of trust (s. 405), the offence is committed by the misappropriation, conversion, or disposal of the property by the person who has the custody thereof; and assuming that the retention of the property after such conversion would make the offence continuous (which may be doubted) the argument could not apply to any third person, to whom the offender might make over the property after conversion unless he abetted the commission of the offence itself.

[1055] Before I conclude I have one word to say about the case of *Rakhal Nikari* v. *Queen-Empress* (1) referred to in the referring order. The question that was argued at the bar in that case was whether the acts and conduct of the petitioner, subsequent to the enticement of the girl out of the keeping of her lawful guardian, were such as would be sufficient to show that he instigated the said enticement, and thereby committed the offence of abetment of kidnapping under s. 363. That was the question upon which Rampini, J., and I disagreed, and which was eventually settled by the judgment of Trevelyan, J. In that case, the proposition, which I thought to be well understood, that the offence of kidnapping was complete when the girl was enticed away, was not questioned, and so both Trevelyan, J., and myself in the course of our respective judgments remarked, and I had no doubt, that the offence was complete when the girl was actually kidnapped. And that is the view which we ought now to adopt.

For these reasons I agree with the learned Chief Justice in holding that the petitioner is not guilty of the offence of kidnapping under s. 363, Indian Penal Code.

RAMPINI, J.—This is a reference under Rule 5, Chap. V of the rules of this Court, in which the question propounded is whether an accused person who, after a minor had been removed from the house of her lawful guardian, joined in taking her to Calcutta for the purpose of making her there lead the life of a prostitute, "can be convicted under s. 363, Penal Code, of kidnapping from lawful guardianship, or whether, that offence being completed when she left the house and guardianship of her husband, he cannot under any circumstances be convicted of that offence."

The learned Judges who make this reference point out that in the case of *Reg* v. *Samia Kaundan* (2) it has been said that "so long as the process of taking the minor out of keeping of his lawful guardian is continued, the offence of kidnapping may be abetted." On the other hand, the Allahabad High Court in *Queen-Empress* v. *Ram Dei* (3) has disapproved of this ruling, and in *Queen-Empress* v. *Ram Sundar* (4) has apparently been of a [1056] contrary opinion. Further, in the case of *Rakhal Nilkari* v. *Queen-Empress* (1) decided by this Court, it has been said by Ghose, J., that the offence of kidnapping is complete when the minor is actually kidnapped.

I would say in the first place, that I feel doubts as to whether this reference has been regularly made. Rule 1 of Chap. V of the Rules of this Court prescribes that a Division Bench is at liberty to refer a case to a Full Bench whenever it differs upon a point of law from another Division Bench of this Court. But the remark of Ghose, J., above cited,

(1) 2 C.W.N. 81. (2) 1 M. 173. (3) 18 A. 350. (4) 19 A. 109.

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appears to me to be the opinion of an individual Judge. Trevelyan, J., though he may have held this opinion, did not express it in so many words, and I, too, who was a party to the decision of that case, expressed no such opinion. Moreover, even if Trevelyan, J., did join Ghose, J., in expressing such an opinion, it was an *obiter dictum ;* for the question when the offence of kidnapping is complete was never decided in that case. It could not be decided, for it was never raised or argued, at least before Ghose, J., and myself. It therefore seems to me that there is no decision of any Bench of this Court from which the Judges who referred this case could differ. There are no doubt conflicting decisions of the Madras and Allahabad Courts on the subject, but these do not appear to me to justify a reference.

But if it be necessary for me to answer the question which forms the subject of this reference, then I would say that I do not think that the offence of kidnapping under s. 363 is necessarily or in all cases complete as soon as the minor is removed from the house of the guardian. It may or may not be complete at this time. When the act of kidnapping is complete would appear to me to be a question of fact to be determined according to the circumstances of each case. In this case whether the conviction under s. 363, Penal Code, of the applicant for revision can be upheld, will depend upon whether, when he joined in promoting the purpose of the other accused, the minor was or was not completely beyond the control of her lawful guardian, which is a question of fact. If she was so beyond his control the conviction of the applicant is without doubt bad. But I cannot consider that she would necessarily be beyond his control, or that [1057] the offence of kidnapping her must be complete, as soon as she was removed from or left his house. In short, the words "taking or enticing a minor out of the keeping of the lawful guardian of such minor" in s. 361 should, I think, be interpreted in a somewhat elastic manner, very much in accordance with the English law on the subject as laid down in the cases of *Reg.* v. *Robb* (1), *Reg.* v. *Robins* (2), and *Reg.* v. *Mankletow* (3). In the first of these cases, it has been held that it is not necessary for a conviction of kidnapping that the prisoner should be present, when the minor quits its house with the intention of abandoning it. In the second, the defendant was convicted under the statute, though all he had done was at the minor's request to place a ladder under a window by which she descended to him. In the third case, a girl left her house alone by a preconcerted arrangement with the prisoner and went to a place appointed, where she was met by him and they then went off together. The prisoner was nevertheless convicted of kidnapping. The provisions of s. 363, Penal Code, should, in my opinion, be similarly interpreted and a person may, I think, be properly convicted of kidnapping from lawful guardianship, though he may not take part in the actual removal of the minor from the guardian's house, though the minor may come to him of his or her own accord, and though the acts which render him amenable to the provisions of s. 363, Penal Code, are committed subsequently to that event, but before the minor is completely beyond the direct or constructive keeping of the guardian.

I say nothing with regard to the facts of the present case, or as to the sufficiency or otherwise of the evidence for the conviction of the applicant, for that evidence has not been laid before us, and I understand the case is to be remitted to the referring Judges for disposal.

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(1) (1864) 4 F. & F. 59. (2) (1844) 1 C. & K. 456.
(3) (1853) Dears. C. C. 159.

HANDLEY, J.—The question referred to the Full Bench is "whether Nemai Chattoraj can be properly convicted under s. 363 of the Indian Penal Code of kidnapping one Johura, a minor, from the lawful guardianship of her husband Gopal Singh."

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[1058] The facts, as found by the Deputy Magistrate of Bankura who originally tried the case and admitted by the learned pleader, who appeared for the Crown, are, that Johura on or about the 20th July 1899 was taken by one Rajani to the house of his father, Rambandhu, a priest; she remained there for two days and then one Mohendro took her away to his house and kept her there for twenty days. At the end of that period, Mohendro, one night, removed her to the house of Nemai Chattoraj. This is the first appearance of Nemai Chattoraj on the scene, twenty-two days after the removal of Johura from her husband's house; there is no evidence whatever before us to connect Nemai Chattoraj with Johura until twenty-two days after she had left or had been taken away from her husband's house. " Kidnapping from lawful guardianship " is defined in the Indian Penal Code as taking or enticing away any minor out of the keeping of the lawful guardian of such minor without the consent of such guardian." The words used are quite clear and explicit, " taking or enticing away." There is no mention of "detaining." Can it be said that a man takes or entices away a minor from the lawful guardianship of her husband when it is found on the evidence that his first connection with the minor is twenty-two days after she has left or has been taken away from her husband's house? It seems to me that the answer must be in the negative. My opinion on the question referred to us is that Nemai Chattoraj cannot be convicted under s. 363 of the Indian Penal Code of kidnapping Johura from the lawful guardianship of her husband. I think it unnecessary for me to say more or to discuss the cases that have been cited before us as they have been fully dealt with in the judgments that have been already delivered.

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Ss. 2, 3—*Breach of contract by workman—Trial—Procedure—Crim. Pro. Code* (V *of* 1898), *s.* 370.—In the trial of a case under the Workman's Breach of Contract Act (XIII of 1859), the Magistrate is not bound to frame his record in accordance with the provisions of s. 370 of the Crim. Pro. Code. It is doubtful whether a proceeding under the first clause of s. 2 and under s. 3 of Act XIII of 1859 is a criminal proceeding. There is no *offence* committed and there is no *accused*. The provisions of s. 370 of the Crim. Pro. Code are, therefore, inapplicable to a case of this nature. AVERAM DAS MOCHI v. ABDUL RAHIM, 27 C. 131=4 C.W.N. 201 ... 86

Act XXII of 1860 (Chittagong Hill Tracts).

S. 1—See HIGH COURT, 27 C. 654.

Act V of 1861 (Police).

S. 34 (*as amended by s.* 13 *of Act* VIII *of* 1895)—*Cow, slaughter of—Open verandah—Annoyance to residents of locality—Open place, Meaning of—Residents or passengers—Police Act Amendment Act* (VIII *of* 1895), *s.* 13.—The slaughtering of a cow in an open verandah, so as to cause annoyance to the residents of the locality, and in spite of their remonstrances is a breach of the law, being an act in an "open place" within the terms of s. 34 of Act V of 1861 as amened by Act VIII of 1895. The words "open place" coupled with "road, street or thoroughfare" should not be interpreted *ejusdem generis*. It seems rather that the addition of these words was intended to have a wider significance, and this is shown by another amendment in the same section made at the same time in which the annoyance, etc., caused must be not to the residents *and* passengers, but to the residents *or* passengers. The intention of the Legislature was to extend the Act not only to passengers who would be on such a road, street, or thoroughfare, but to residents, who are not passengers. KHAN BAPUTI DEWAN v. BISPATI PUNDIT, 27 C. 655 ... 429

Act I of 1869 (Oudh Estates).

Succession to a talukdari—Effect of declaration by holder as to who should be his heir.—The official enquiries made of talukdars at an early period of British administration, as to who were to be their successors, were not intended

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to derogate from the rights of talukdars in their heritable and transferable estates. To such an enquiry an answer in 1862 made by a sanad-holding talukdar, since deceased, who was entered in lists I and II (under the Oudh Estates Act, 1869), stated that she appointed to be her heir the father of the present plaintiff, appellant. The father, however, died before the talukdar, and the son now claimed that this nomination amounted to a gift of the talukhdari estate, subject to a trust for the life of the then talukhdar. *Held*, that the answer of 1852 did not operate to confer any estate upon the person named. BALBHADDAR SINGH v. SHEO NARAIN SINGH, 27 C. 344 (P.C.)=26 I.A. 194=7 Sar. P.C.J. 625 ... 227

Act I of 1871 (Cattle Trespass).

S. 22—*Illegal seizure of cattle—Fine—Compensation.*—A Magistrate is not competent under s. 22 of the Cattle Trespass Act to pass any sentence of fine, he can only award compensation for the illegal seizure of cattle. BHAGIRATHI NAIK v. GANGADHAR MAHANTY, 27 C. 992=5 C.W.N. 32 649

Act X of 1873 (Oaths).

(1) S. 5—See FALSE EVIDENCE, 27 C. 455.

(2) *S.* 9—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 462—*Offer by guardian of minor defendant to be bound by oath of plaintiff.*—The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on oath taken in a particular form under the Indian Oaths Act, stands on a very different ground from an agreement or compromise contemplated by s. 462 of the Civ. Pro. Code. In such a case the minor is bound by the consent of his guardian although given without the leave of the Court provided that there is no fraud or gross negligence on the part of the guardian. SHEO NATH SARAN v. SUKH LALL SINGH, 27 C. 229=4 C.W.N. 327 ... 151

Act VI of 1876 (Chota Nagpore Encumbered Estates).

Ss. 2, 3 (c), 4—12—*Meaning of the words* "*holder*" *and* "*heir*"—*Capacity to mortgage.*—The words "holder" and "his heir" are used throughout the Chota Nagpore Encumbered Estates' Act in the sense of the *holder* of the property *at the time* of the determination of the debts and liabilities under s. 8 of the Act and *his* heir. The word "heir" in the Act always applies to the person who is the holder's heir at the time of such determination of the debts and liabilities and to no other heir, nor to the heir's heir. The estate of *F* came under management under the Chota Nagpore Encumbered Estates' Act in 1880. He had several sons, of whom *B* was the eldest and *J* the next in age. *F* died in 1884, and according to the custom of the family, *B* succeeded him to the estate, and on *B* dying in 1882 without leaving a male issue, *J* succeeded him. On the 8th June 1884, *J* mortgaged a village which had been granted to him by his father for his maintenance, and which never came under the management of the Encumbered Estates. *Held*, that there was nothing in s. 3, cl. (*c*), of the said Act to incapacitate *J* from mortgaging the property. The object of Act VI of 1876 explained. KOKA MAHTON v. MANKI JAGAR NATH SAHI, 27 C. 462=4 C.W.N. 158 ... 304

Act VII of 1878 (Forest).

Ss. 25, 54—*Conviction for offence under—Subsequent order for confiscation of boats—When such order should be made.*—Certain accused persons were tried summarily and convicted under s. 25 of the Indian Forest Act, and sentenced to pay fines. By a subsequent order under s. 54 of the same Act their boats were confiscated. *Held*, that under the terms of s. 54 an order of confiscation cannot be regarded as an order incidental on the conviction. The confiscation is by the terms of that section declared to be a punishment, for it is in addition to any other punishment prescribed for the offence. Being a punishment, the order should have been passed simultaneously with the other punishment for the offence of which the accused have been convicted. AIUNDDI SHEIKH v. QUEEN-EMPRESS, 27 C. 450 ... 296

Act XI of 1878 (Arms).

S. 19—*Possession of or control over arms or ammunition—Search, legality of—Sanction to prosecute—Code of Criminal Procedure* (*Act* V *of* 1898),

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ss. 55, 103 *and* 165—*Arms Act (*XI *of* 1878), *ss.* 20, 25, 29 *and* 30.—The license of the accused for the possession of firearms and ammunition was cancelled in August 1897. He was suspected of being in possession of arms after the cancellation of his license. On the 23rd of April 1899, the Assistant Magistrate of Purneah with a number of police went to the house of the accused to search for arms. They surrounded it, arrested the accused, and then searched his house. The police had no search warrants, nor was there anything to show upon what charge the accused was arrested. Two gun stocks, some ammunition and implements for reloading were discovered in the house. There was nothing to show that the sanction required by s. 29 of the Arms Act was given before proceedings were instituted against the accused. Accused was convicted and sentenced under ss. 19 and 20 of the Arms Act. *Held* that the conviction under s. 20 was not sustainable, but that the accused must be taken to have had arms and ammunition as defined by the Arms Act within the meaning of sub-s. (*f*) of s. 19 of that Act, and the conviction under that section must be confirmed. *Held* further that with respect to the question of whether or not any previous sanction had been given under s. 29 of the Arms Act, the Court was not unmindful of the suggestion that the charge in this case was, in the first instance, in respect of an alleged offence under s. 20 and not of one under s. 19; but that ss. 19 and 20 were so interwoven that it was difficult to see how an offence could be committed under the first paragraph of s. 20 unless an offence under one of the enumerated sub-sections in s. 15 had also been committed. It was not suggested that the charge here was an offence under the second paragraph of s. 20. AHMED HOSSEIN v. QUEEN-EMPRESS, 27 C. 692=4 C.W.N. 750 ... 455

Act XVIII of 1879 (Legal Practitioners).

Ss. 13, *cl.* (*f*), 14, *as amended by Act* (XI *of* 1896)—*Professional misconduct—Misconduct prior to enrolment as Legal Practitioner—"Any other reasonable cause"*—Ejusdem generis—*Permanent defect of character—"Taking instructions" and "Misconduct"—Authority of Subordinate Courts to proceed under s. 14 of the Legal Practitioners' Act—Departmental enquiry—Legal proof.*—One *P*, a Sub-Inspector of Police, was committed for trial to the Court of Sessions on charges of bribery, forgery and other offences, but was acquitted. He was, however, departmentally found guilty of misconduct and was dismissed from the Government service in 1891. In 1893, suppressing the fact of his dismissal, he obtained a certificate of good moral character from a pleader, and on the strength of that certificate gained admission to the *mukhtarship* examination which he passed, and was enrolled as a *mukhtar* and was practising as such for six years in the district of Bhagalpore, apparently without any fault. The Sessions Judge of Bhagalpore having made a reference under s. 14 of the Legal Practitioners' Act, recommending his dismissal for the aforesaid misconduct, *held*, *per* GHOSE, J.—The misconduct on the part of *P* being antecedent to his passing the *mukhtarship* examination and enrolment as a *mukhtar*, and consequently having no relation to his business as *mukhtar*, it is extremely doubtful whether such misconduct is "any other reasonable cause" for his suspension or dismissal within the meaning of s. 13, cl. (*f*) of the Legal Practitioners' Act. And it is also doubtful whether, when he applied to the pleader for a certificate, *P* was bound to relate to him the past history of his life. *Per* RAMPINI, J.—The misconduct of *P* constituted a "reasonable cause" for his dismissal under the provisions of s. 13, cl. (*f*) of the Legal Practitioners' Act. *Per* HILL, J. (agreeing with RAMPINI, J.)—S. 13, cl. (*f*) of the Legal Practitioners' Act was intended to cover misconduct other than professional misconduct and to embrace all causes other than those previously enumerated in the section, which might reasonably be regarded as disqualifying a person for retaining the office of pleader or mukhtar. An offence committed prior to admission may be made the foundation of proceedings under s. 13 of the Legal Practitioners' Act provided it is of such a nature as to imply a permanent defect of character of a disqualifying kind. *Held per* HILL, J. (agreeing with GHOSE, J.)—That *P*, while a Sub-Inspector of Police, having been "departmentally," and not on legal proof, found guilty of misconduct, no case either for suspension or dismissal from the profession of mukhtar

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had been made out against him. *Held*, further, *per* HILL, J., that "taking instruction" and "misconduct" referred to in s. 14 of the Legal Practitioners' Act relate to cls. (*a*) and (*b*) respectively, of s. 13 of the Act, and it is only in such cases that a Subordinate Court is authorized to proceed under s. 14. The charges in the present case not falling under either of these heads the proceedings were bad. The inquiry ought to have been held by the High Court. *In the matter of* PURNA CHUNDER PAL, 27 C. 1023=4 C.W.N. 389 ... 671

Act V of 1881 (Probate and Administration).

(1) Ss. 50, 83—See PROBATE, 27 C. 350.

(2) Ss. 82 *and* 92—*Direction in the will that all the executors will act jointly—Act of an executor who has taken out probate and the others not having done so, how far binding on the estate of the testator.*—Where by a will more than one person are appointed executors, and all of them jointly are empowered to alienate any property for payment of debts and to borrow money for the improvement and preservation of the estate of the testator, s. 92 of the Probate and Administration Act (V of 1881), by the reason of any such direction in the will does not disqualify one of the several executors who alone has obtained probate, to act singly, the others having refused to accept service. Where such an executor renewed *hatchittas* which were originally executed by the testator, in the same terms as the testator did, and a suit was brought upon these *hatchittas* against the heirs of the testator. *Held*, that the debt was binding on the estate of the testator. SATYA PRASHAD PAL CHOWDHRY v. MOTILAL PAL CHOWDHRY, 27 C. 683. ... 448

(3) S. 86—See APPEAL (GENERAL), 27 C. 5.

Act VI of 1881 (District Delegates).

Ss. 8, 9—See APPEAL (GENERAL), 27 C. 5.

Act XVIII of 1881 (Central Provinces Land Revenue).

S. 87—See HINDU LAW (JOINT FAMILY), 27 C. 515.

Act VIII of 1885 (Bengal Tenancy).

(1) *Applicability of Act to lands outside the limits of the town of Calcutta, but within its municipal boundaries—Calcutta Municipal Consolidation Act (Bengal Act* II *of* 1888), *s.* 3—*Town of Calcutta, Municipal boundaries of.*—The Bengal Tenancy Act applies to lands situated outside the limits of the town of Calcutta, but within its municipal boundaries, as defined by Bengal Act II of 1888. BIRAJ MOHINI DASSI v. GOPESWAR MULLICK, 27 C. 202 ... 133

(2) S. 3. sub-s. 5—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 27 C. 827.

(3) S. 5, sub-s. 1—See LANDLORD AND TENANT, 27 C. 205.

(4) S. 7, sub-s. 3—See LANDLORD AND TENANT, 27 C. 205.

(5) Ss. 15 *and* 16—*Arrears of rent, suit for—Suit by a* putnidar *on the death of the last owner against the* durputnidar, *without complying with the provision of s.* 15 *of the Bengal Tenancy Act, whether maintainable—Holder of a tenure.*—In a suit for arrears of rent for the years 1299 B.S. to Falgoon 1302 B.S. brought by *putnidars* on the death of the last owner on the 14th Aghran 1302 B.S., the defence of the *durputnidar* mainly was that the plaintiffs not having complied with the provisions of s. 15 of the Bengal Tenancy Act, the suit was not maintainable. *Held*, that as the plaintiffs did not claim the rent, which fell due during the lifetime of the last owner as the holder of the tenure, but claimed it either as the representatives of the holder of the tenure for the time being or as representatives of their father, the rent became an increment to the estate of the father, and therefore the suit was maintainable. SHERIFF WILLIAM v. JOGEMAYA DASI, 27 C. 535 ... 352

(6) Ss. 15, 16, 26—*Whether the heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant*—An heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant. ANANDA KUMAR NASKAR v. HARI DASS HALDAR, 27 C. 545=4 C.W.N. 608 ... 359

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(7) S. 22—*Occupancy, non-transferable right of—Effect of purchase of non-transferable right of occupancy by a co-sharer landlord.*—S. 22 of the Bengal Tenancy Act applies only to occupancy-holdings which are transferable. In the case of a non-transferable occupancy holding, the holding itself, as apart from the right of occupancy, cannot be sold so as to give the transferee a right to retain possession of it. GRISH CHANDRA CHOWDHRY v. KEDAR CHANDRA ROY, 27 C. 473=4 C.W.N. 569 ... 311

(8) S. 26—See SALE, 27 C. 545.

(9) S. 46, *sub-ss.* (6) *and* (9)—*Non-occupancy raiyat—Enhancement of rent—Fair and equitable rent.*—Sub-s. (9) of s. 46 of the Bengal Tenancy Act is not exhaustive. It was not intended that if there was no land of a similar description and with like advantage in the same village as the land in suit, it should be impossible to enhance the rent of a non-occupancy raiyat upon any other ground. HOSAIN ALI KHAN v. HATI CHARAN SHAW, 27 C. 476=4 C.W.N. 321 ... 313

(10) S. 52, *cl.* (6) *and s.* 188—*Abatement of rent—Suit for rent by several joint landlords against one of the joint tenants, whether in such a suit the tenant can claim abatement of rent—"Tenant" meaning of.*—The expression "tenant" in s. 52 of the Bengal Tenancy Act does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure; it means the tenant of the tenure and not one of many tenants. In a suit for rent, brought by some of several joint landlords against one of several joint-tenants for recovery of the plaintiff's share of the rent payable on account of the defendant tenant's share of the tenure under a previous arrangement, such tenant-defendant cannot claim abatement under the provisions of s. 52 of the Bengal Tenancy Act. BHOOPENDRA NARAIN DUTT v. ROMON KRISHNA DUTT, 27 C. 417=4 C.W.N. 107 ... 275

(11) S. 102, *cl. (h), ch.* X—*Condition or incident of tenancy—Dispute as to right of way between two neighbouring tenants—Jurisdiction of Settlement Officer.*—A Settlement Officer has no jurisdiction to decide civil disputes between tenant and tenant. A dispute as to a right of way between two neighbouring tenants is of a civil nature, and the existence of a right of way cannot be regarded as a condition or incident of a tenancy. HARO MOHUN ROY CHURAMONI v. PRAN NATH MITTER, 27 C. 364 ... 240

(12) Ss. 107, 108—See JURISDICTION, 27 C. 167.

(13) S. 153—See APPEAL (SECOND APPEAL), 27 C. 484.

(14) S. 188—*Joint-landlords—Suit for apportionment of rent and for splitting a jama—Frame of suit—Parties—Arrears of rent.*—Section 188 of the Bengal Tenancy Act does not prohibit joint landlords from ceasing to be joint, or preclude them from suing for their shares of the rent separately, when they have ceased, or wish to cease, to be joint landlords; provided that the suits are so framed as to free the tenant from all further liability to any one of them. When, therefore, the plaintiffs who are joint landlords, have in suits separately instituted by them against the defendant tenant, asked for apportionment of rent and for recovery of rents due on such apportionment, and all the parties interested have been made parties to the suits, there is no reason why the plaintiffs should not have the rent apportioned; and the apportionment may take place in respect both of the arrears alleged to be due and the future rent. RAJNARAIN MITTER v. EKADASI BAG, 27 C. 479=4 C.W.N. 494 ... 315

(15) S. 189—See LANDLORD AND TENANT, 27 C. 774.

(16) Sch. III—See LANDLORD AND TENANT, 27 C. 205.

(17) Sch. III, art. 3—See LIMITATION, 27 C. 540.

Act II of 1886 (Income-Tax).

Ss. 3, 4, 5—*Religious endowment*—Sajjadanashin—Khankah—*Liability of the Sasseram* Sajjadanashin *to pay income-tax—Assessment of income tax—Exemption from assessment—"Salary" —Remuneration—Maintenance—Position of* Sajjadanashin *as distinguished from that of* Mutwalli—*Wakf Farrukhsyari property.*—The *Sajjadanashin* of the Sasseram *Khankah* is not liable to be assessed with income-tax under the provisions of Act II of

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1886, in respect of such money as he draws from the *Khankah* properties for the purpose of his own maintenance and that of his family. The position of the *Sajjadanashin* discussed, and distinguished from that of a *Mutwalli*. *Semble*—The maintenance of the *Sajjadanashin* of the Sasseram *Khankah* is a part of the purpose for which the *Khankah* was established. SECRETARY OF STATE FOR INDIA v. MOHIUDDIN AHMAD, 27 C. 674 ... 443

Act IX of 1887 (Provincial Small Cause Court).

Sch. II, *cl.* (8)—*Suit by an assignee of arrears of rent after they fall due, whether cognizable by the Small Cause Court—Bengal Tenancy Act* (VIII *of* 1885), *s.* 3, *sub-s.* 5—*Rent.*—*Held* by the Full Bench (BANERJEE, J., dissenting) that a suit brought by an assignee of arrears of rent, after they fell due, for the recovery of the amount due, is a suit for rent, and therefore excepted from the cognizance of the Court of Small Causes. SRISH CHUNDER BOSE v. NACHIM KAZI, 27 C. 827 (F.B.) = 4 C.W.N. 357 ... 542

Act XII of 1887 (Bengal, Agra and Assam Civil Courts).

S. 13, cl. 2—See JURISDICTION, 27 C. 272.

Act IV of 1889 (Merchandise Marks).

S. 3—See TRADE-MARK, 27 C. 776.

Act VI of 1889 (Probate and Administration).

Ss. 4, 12—See APPEAL (GENERAL), 27 C. 5.

Act VIII of 1895 (Police).

S. 13—See ACT V OF 1861 (POLICE), 27 C. 655.

Act XI of 1896 (Legal Practitioners).

See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 27 C. 1023.

Act VIII of 1897 (Reformatory Schools).

Ss. 8, 11, 16 *and* 31—*Rule framed by the Local Government—Youthful offender—Evidence of age—Order not properly passed—Penal Code (Act* XLV *of* 1860), *s.* 83.—If an order for detention in a Reformatory School in substitution for transportation or imprisonment be not properly passed, a Court is not debarred by s. 16 of the Reformatory Schools Act (VIII of 1897) from altering or reversing such order. A boy of about 9 years of age was found in the grounds of the residence of the Commissioner of Patna at 3 A. M., in the morning with a brass *lota* in his hand. He was tried summarily and, without any preliminary inquiry as to the age of the boy being made, was sentenced to three months' rigorous imprisonment, or in lieu thereof to be detained in a Reformatory School for seven years. *Held*, the accused did not come within the definition of "youthful offenders" as given in the Rules framed by the Local Government under s. 8 of the Reformatory Schools Act, and the offence of the accused being his first offence the case should have been dealt with under s. 31 of the Act. It is not that a Magistrate is under no circumstances competent to find from the appearance of a person convicted by him that he is a youthful offender, but it is generally desirable that there should be some reliable evidence on the point, and especially when it is necessary to determine the period of detention. The age of the accused being under twelve years the Magistrate should, considering the provisions of s. 83 of the Penal Code, have found that the accused had attained sufficient maturity of understanding to judge of the nature and consequences of this act. QUEEN-EMPRESS v. MAKIMUDDIN, 27 C. 133 ... 88

II.—Bengal Acts.

Act VIII of 1865 (Bengal Rent Recovery).

See SALE, 27 C. 407.

Act II of 1867 (Bengal Public Gambling).

See PENAL CODE (ACT XLV OF 1860), 27 C. 144.

Act VII of 1868 (Bengal Land Revenue Sales).

Ss. 2 and 8—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 27 C. 698.

Act VII of 1876 (Land Registration, Bengal). PAGE

S. 78—Suit for rent—Legal representative of registered proprietor—Landlord and tenant.—A suit for rent was instituted by the registered proprietor of an estate, who died during the pendency of the suit. His widow, the present plaintiff, was then substituted on the record in his place, but her name was not registered under the provisions of the Land Registration Act before the disposal of the suit in the first Court. *Held*, that as the present plaintiff was claiming rent due to the deceased plaintiff in a representative character, s. 78 of the Land Registration Act did not bar her claim, and she was entitled to a decree. PRAMADA SUNDARI DEBI v. KANAI LALL SHAHA, 27 C. 178 ... 117

Act I of 1879 (Chota Nagpore Landlord and Tenant Procedure, Bengal).

Ss. 37, 38, 47, 49, 56, 62-67, 98, 113, 137, 144—See APPEAL (SECOND APPEAL), 27 C. 508.

Act IX of 1879 (Court of Wards, Bengal).

S. 55—See LIMITATION ACT (XV OF 1877), 27 C. 242.

Act VII of 1880 (Public Demands Recovery, Bengal).

(1) *Ss. 2, 8, 10 and 12—Bengal Act VII of 1868, ss. 2 and 8—Sale for arrears of cesses—Suit to set aside such a sale on the ground that no notice was issued under s. 10 of the Act, whether maintainable in the Civil Court.*—A suit to set aside a sale held for arrears of cesses on the ground that no notice of the certificate under s. 10 of Bengal Act VII of 1880 was served upon the plaintiff is maintainable in the Civil Court. CHUNDER KUMAR MUKERJEE v. SECRETARY OF STATE FOR INDIA, 27 C. 698 = 4 C.W.N. 586 ... 458

(2) S. 4—See CLAIM, 27 C. 714.

Act III of 1884 (Bengal Municipal).

(1) *Ss. 85, cl. (a), 87, 114, 116—Bengal Act IV of 1894, B. C., amending Bengal Act III of 1884—Municipal taxation—Assessment—Appeal against assessment—Jurisdiction of Civil Court to set aside an assessment—" Circumstances and property within Municipality "—Capability and circumstances of the assessee—Specific Relief Act (I of 1877), ss. 42, 45.*—An assessment of tax under s. 85, cl. (a) of the Bengal Municipal Act (III of 1884) as amended by Bengal Act IV of 1894 B. C. made in consideration of the assessee's " circumstances and property " (altogether or partly) outside the local limits of the Municipality is *ultra vires* and illegal; and the Civil Court has jurisdiction to set aside such an assessment. KAMESHWAR PERSHAD v. THE CHAIRMAN OF THE BHABUA MUNICIPALITY, 27 C. 849 ... 556

(2) *Ss. 155, 156—Ferry, Meaning of—Boat plying for hire without license within prescribed limits of ferry—Right of ferryman to demand tolls.*—The expression " a ferry " in the Bengal Municipal Act means the exclusive right to carry passengers across the stream from one bank to the other on payment of certain prescribed tolls. The object of s. 155 of that Act appears to be to prevent the crossing of passengers from one bank of the river to the opposite bank by a boat plying for hire without a license within the prescribed limits. *Semble*, therefore, that the mere crossing of the bar of a *khal* leading into the limits of a Municipal ferry would not constitute a breach of the Act. A ferryman has no authority to demand tolls from persons who are merely passengers in an unlicensed boat. The remedy against the person who keeps a ferry-boat without a license plying within the prescribed limits is provided by s. 156 of that Act. GOVERNMENT OF BENGAL v. SENAYAT ALI, 27 C. 317 = 4 C.W.N. 348 ... 209

Act II of 1888 (Bengal, Calcutta Municipal Consolidation).

S. 3—See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 202.

Act I of 1892 (Bengal Village Chaukidari).

S. 13—See ARREST, 27 C. 366.

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Administrator.

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Authorized to sign for principal, liability of—See STAMP ACT (I OF 1879), 27 C. 324.

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Between members of family—See DECREE, 27 C. 103.

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(1) See ACCRETION, 27 C. 336.
(2) See BURDEN OF PROOF, 27 C. 221.

Alluvion.

See REGULATION XI OF 1825 (BENGAL ALLUVION AND DILUVION), 27 C. 768.

Alteration.

See SENTENCE, 27 C. 175.

Amin.

(1) Local investigation by—See MESNE PROFITS, 27 C. 951.
(2) Report of, evidence after—See MESNE PROFITS, 27 C. 951.

Ammunition.

See ACT XI OF 1878 (ARMS), 27 C. 692.

Appeal.

1.—GENERAL.
2.—CRIMINAL.
3.—SECOND APPEAL.
4.—TO PRIVY COUNCIL.

——— **1.—General.**

(1) *Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 2, 232, 244, *cl.* (*c*)—*Civ. Pro. Code Amendment Act* (VII *of* 1888)—*Application by transferee from legal representative of decree-holder—Question relating to execution discharge, satisfaction or stay of execution of decree—Parties to suit—Legal representative—Meaning of the terms "transferee" and "representative"—Decree—Administrator of estate.*—Any person who at the time of the execution of a decree is a transferee within the meaning of s. 232 of the Code of Civil Procedure is a representative of the decree-holder within the meaning of s. 244, cl. (*c*), of the Code; and the term *representatives* in that section includes subsequent transferees as well as those who purchased directly from the person who obtained the decree. An order of a Court executing a decree determining whether an alleged *transferee* from a decree-holder or from his legal representative is or is not the representative of the decree-holder within the meaning of s. 244, cl. (*c*) of the Code of Civil Procedure, is an order under that section and therefore a decree, and an appeal lies from such order. GANGA DAS SEAL v. YAKUB ALI DOBASHI, 27 C. 670 ... 440

(2) Filing paper books for—See PRACTICE, 27 C. 57, 60-N.

(3) *Order permitting withdrawal of a suit—Appeal from order setting aside the order of withdrawal and dismissing the suit—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 2, 373 *and* 588.—An order under s. 373 of the Civ. Pro. Code giving permission to withdraw a suit with liberty to bring a fresh one is not a "decree" within the meaning of s. 2 of the Code, and is not appealable. If, however, such an order is appealed from and the lower appellate Court sets aside the order and dismisses the suit, then the order

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of the lower appellate Court is a "decree" within the meaning of s. 2 of the Code, and is appealable. ABDUL HOSSEIN v. KASI SAHU, 27 C. 362=4 C.W.N. 41 ... 239

(4) *Order refusing to amend a clerical error in the form of probate—Probate and Administration Act* (V *of* 1881), *s.* 86—*Succession Act* (X *of* 1865), *s.* 263—*Exercise of power of High Court under s.* 622 *of the Civ.Pro.Code*, 1882, *when there is no appeal.*—Where there was a clerical error in the form of probate granted, and the Judicial Commissioner refused to amend it on the ground that the probate was granted by his predecessor, it was held that though there was no appeal from such an order either under s. 86 of the Probate and Administration Act (V of 1881) or s. 263 of the Succession Act (X of 1865), yet the High Court might deal with the case under s. 622 of the Civ. Pro. Code, and set aside the order. GERINDRA KUMAR DAS GUPTA v. RAJESWARI ROY, 27 C. 5 ... 4

(5) *Order rejecting an application for restoring to the file an application to set aside a sale in execution of a decree—Civ. Pro. Code* (XIV *of* 1882), *ss.* 311, 588 (8)—*Execution proceedings—Dismissal for default.*—No appeal lies from an order rejecting an application to restore to the file an application to set aside a sale under s. 311 of the Civ. Pro. Code, which has been dismissed for default. SUJA UDDIN v. REAZUDDIN, 27 C. 414 =4 C.W.N. 417 ... 23

(6) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 34.

———**2.—Criminal.**

(1) Alteration of sentence on—See SENTENCE, 27 C. 175.

(2) *Taking of additional evidence by appellate Court—Dismissal of appeal—Accused's right of appeal from such dismissal—Code of Criminal Procedure* (*Act* V *of* 1898), *s.* 428.—Where an appellate Court has under s. 428 of the Code of Criminal Procedure taken additional evidence, the accused whose appeal has been dismissed by such Court has no right of appeal to the High Court. QUEEN-EMPRESS v. ISAHAK, 27 C. 372=4 C.W.N. 497 ... 246

(3) See CHARGE, 27 C. 660.

(4) See HIGH COURT, 27 C. 654.

———**3.—Second Appeal.**

(1) *Execution of rent decree valued at less than Rs.* 100—*Bengal Tenancy Act* (VIII *of* 1885), *s.* 153—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 647.—Where the original suit is a suit for rent valued at less than Rs. 100 and the decree or order made in it does not decide a question relating to title to land or some interest in land as between parties having conflicting claims thereto, or a question of a right to enhance or vary the rent of a tenant, or a question of the amount of rent annually payable by a tenant, no second appeal will lie in respect of an order made in execution proceedings relating thereto. SHYAMA CHARAN MITTER v. DEBENDRA NATH MUKERJEE, 27 C. 484=4 C.W.N. 269 ... 318

(2) *Suit for arrears of rent—Chota Nagpore Landlord and Tenant Procedure Act* (*Bengal Act* I *of* 1879), *ss.* 37, 38, 47, 49-56, 62-67, 76, 98, 135, 137, 144—*Civ. Pro. Code* (XIV *of* 1882), *ss.* 3, 4, 534.—No second appeal lies in a suit for arrears of rent brought under the provisions of the Chota Nagpore Landlord and Tenant Procedure Act (Bengal Act I of 1879). The cases of 11 C. L. R. 480 and 24 C. 249, so far as they held that a second appeal did lie in cases of this nature arising under Bengal Act I of 1879, were wrongly decided. KHEDU MAHTO v. BUDHUN MAHTO, 27 C. 508 (F.B.)=4 C.W.N. 333 ... 334

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 529.

———**4.—To Privy Council.**

(1) Stay of proceedings pending—See PRIVY COUNCIL, 27 C. 1.

(2) See PRIVY COUNCIL, 27 C. 333.

Appearance.

By mukhtear—See CONTEMPT, 27 C. 985.

Appellate Court.

(1) Power of, to order re-trial—See SESSIONS JUDGE, 27 C. 172.

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(2) *Question of mixed law and fact raised for first time in appellate Court—Objection taken for first time on appeal.—Semble*—When a question raised before the appellate Court is a mixed one of law and fact, and one which was not raised before the Court of first instance, it is doubtful whether the appellate Court should allow it to be raised. UMRAO BIBI v. MAHOMED ROJABI, 27 C. 205=4 C.W.N. 76 ... 186

(3) See APPEAL (CRIMINAL), 27 C. 372.

Application.

(1) For extension of time to file Paper Books—See PRACTICE, 27 C. 57, 60-N.

(2) In accordance with law—See LIMITATION ACT (XV OF 1877), 27 C. 210.

Apportionment.

See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 479.

Arbitration.

(1) *Code of Civil Procedure* (*Act* XIV *of* 1882), *ss.* 506 *and* 578—*Reference to arbitration, not by a written petition, but by consent of parties—Whether an award passed on such reference* ab initio *void—Irregularity not affecting the merits of the case or the jurisdiction of the Court.*—The second paragraph of s. 506 of the Civ. Pro. Code, which says that every application for an order of reference shall be made in writing, is directory only; therefore in a case where both parties consented to a reference to arbitration and where the order of reference was made by the Court in the presence of their counsel or advocates, but not upon a written application, such a reference is not a nullity, as it is merely an irregularity not affecting the merits of the case or the jurisdiction of the Court. SHAMA SUNDRAM IYER v. ABDUL LATIF, 27 C. 61=4 C.W.N. 92 ... 41

(2) Decree and settlement on—See DECREE, 27 C. 103.

(3) In partition suit uncompleted—See HINDU LAW (JOINT FAMILY), 27 C. 1013.

Arms.

Or ammunition—See ACT XI OF 1878 (ARMS), 27 C. 692.

Arrest.

(1) *By police on an order in writing—Whether police obliged to show authority under which they act to person arrested—Resistance to such arrest—Escape from custody—Code of Criminal Procedure* (*Act* V *of* 1898), *ss.* 56 *and* 80—*Penal Code* (*Act* XLV *of* 1860), *s.* 224.—There is nothing extending s. 80 of the Code of Criminal Procedure to an arrest made by the police on an order in writing under s. 56 of that Code, so as to require that any information as to the authority under which the police are acting must be given to the person arrested in order to make it an arrest warranted by law. It may be desirable or even obligatory that if called upon the police officer making such an arrest should show the person arrested the authority under which he is acting, but to hold that he is bound to do so before he can properly arrest and detain in custody such a person, so as to make the arrest and the detention lawful, would be to extend the law beyond what the Legislature has thought proper to declare it. QUEEN-EMPRESS v. BASANT LALL, 27 C. 320=4 C.W.N. 311 ... 211

(2) *Village chaukidar, whether a police officer—Person unlawfully arrested by a private person and made over to village chaukidar—Rescue from custody of village chaukidar—Lawful custody—Penal Code* (*Act* XLV *of* 1860), *s.* 225, —*Crim. Pro. Code* (*Act* V *of* 1898), *s.* 59—*Village Chaukidari Amendment Act* (*Bengal Act* I *of* 1892), *s.* 13.—*S*, who was alleged to have committed theft, was unlawfully arrested by a private person and made over to the custody of the village chaukidar. The theft was not committed in view of such private person. *S* was rescued from the custody of the village chaukidar by the accused. The accused were convicted under s. 225 of the Penal Code and sentenced each to two months' rigorous imprisonment. *Held*, that a village chaukidar cannot be properly regarded as a police-officer within the terms of s. 59 of the Code of Criminal Procedure, and that *S*, therefore, was not in lawful custody at the time of his rescue. Conviction and sentence set aside. KALAI v. KALU CHOWKIDAR, 27 C. 366=4 C.W.N. 252 ... 24

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(3) *Warrant of arrest directed to police officer—Endorsement of warrant by another police officer to process-serving peons—Legality of such endorsement—Peons not police officers—Arrest by peons—Rescue of persons arrested—Whether lawful arrest—Code of Criminal Procedure* (*Act* V *of* 1898), *ss.* 68 *and* 79.—A warrant of arrest was endorsed over to a Court Sub-Inspector for execution. The Court Sub-Inspector being away the Court Head Constable by an order in writing signed by himself endorsed this warrant over to two process-serving peons for execution. The peons arrested a number of men under the warrant, some of whom were forcibly rescued by the accused and other persons. The accused were convicted under various sections of the Penal Code of rescuing the persons arrested and obstructing the execution of the warrant of arrest. *Held*, that the endorsement of the warrant by the Court Head Constable to the peons did not make them competent to execute the warrant; and that even if the peons had been legally appointed, they could not have made the arrest, inasmuch as they were not police-officers within the terms of s. 79 of the Code of Criminal Procedure. The terms of s. 79 are express in this respect, and no other person except a police officer is competent to execute a warrant of arrest under an endorsement from another police officer. DURGA CHARAN JEMADAR v. QUEEN-EMPRESS, 27 C. 457 ... 301

(4) See MAGISTRATE, 27 C. 979.

Assessment.

Of tax—See ACT III OF 1884 (BENGAL MUNICIPAL), 27 C. 849.

Assignment.

(1) Of part of impartible estate—See DECREE, 27 C. 103.

(2) Of shares as partners—See PARTNERSHIP, 27 C. 93.

(3) See LANDLORD AND TENANT, 27 C. 67.

(4) See MORTGAGE (GENERAL), 27 C. 587.

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For purpose of habitually committing theft—See EVIDENCE, 27 C. 139.

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See INSURANCE, 27 C. 593.

Attachment.

(1) *Subjects of attachment—Civ. Pro. Code* (XIV *of* 1882), *s.* 266—*Meaning of the word "debt"—Attachment in execution of decree—Prohibitory order—Attachment of maintenance allowance.*—The word "debt" in s. 266 of the Civ. Pro. Code means an actually existing debt, that is, a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen. When, therefore, *A* is bound under a deed to pay *B* a monthly maintenance allowance during the life-time of the latter, there cannot be a valid attachment of any portion of the allowance by a prohibitory order issued to *A* of a date anterior to the time when the same falls due to *B*. HARIDAS ACHARJIA CHOWDHRY v. BARODA KISHORE ACHARJIA CHOWDHRY, 27 C. 38=4 C.W.N. 87 ... 26

(2) See SALE, 27 C. 407.

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(1) Of bond—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 190.

(2) See HINDU LAW (WILL), 27 C. 169.

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(1) Of arbitrators, decree and settlement on—See DECREE, 27 C. 103.

(2) Validity of—See ARBITRATION, 27 C. 61.

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See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 468.

Bank.

See TRADE-MARK, 27 C. 776.

Benami Transaction.

Suit by real owner against benamidar—*Colorable transaction in fraud of creditors—Fraudulent purpose given effect to by claim successfully preferred by the* benamidar.—A suit does not lie for a declaration that a conveyance executed by the plaintiff is a *benami* and fictitious transaction, when the alleged transaction has been used to *accomplish* the fraudulent purpose for which it was intended. The fraudulent purpose is *accomplished* when the property conveyed being attached by a decree-holder, the *benamidar* is allowed to prefer a claim to it and the claim is allowed by the Court. BANKA BEHARY DASS v. RAJ KUMAR DASS, 27 C. 231=4 C.W.N. 289. 153

Boats.

(1) Confiscation of—See ACT VII OF 1878 (FOREST), 27 C. 450.

(2) Plying for hire without license within limits of ferry—See ACT III OF 1884 (BENGAL MUNICIPAL), 27 C. 317.

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Admissibility of, in evidence—See EVIDENCE ACT (I OF 1872), 27 C. 118.

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Breach of Contract.

(1) See ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT), 27 C. 131.

(2) See INTEREST, 27 C. 421.

Bribe.

Abetting offence of giving—See PENAL CODE (ACT XLV OF 1860), 27 C. 144.

Burden of Proof.

(1) *Accretion—Right of riparian proprietors—Title to alluvial land contested between villages on opposite banks—Possession—Prescription—Limitation.*—The plaintiffs were the proprietors of a village on the southern bank who disputed with those of a village on the northern bank the ownership of alluvial land formed by the Ganges. The current, after having encroached upon the southern bank, went away from that side of the river towards the northern, leaving the tract of alluvial land now in dispute. This appeared on its previous site to the south of the main stream. It was then carried away by diluvion, and again appeared after that. This land was claimed by the plaintiffs, not as part of their old land, but on the strength of their having held possession, adversely and without interruption, for more than twelve years before their dispossession by the defendants, by whom they alleged themselves to have been ousted within less than twelve years before they brought this suit. The evidence did not support their claim, the burden of proof being on them. It was shown that after the second recession of the river towards the north, and after the re-appearance of the alluvial land on the south of the current, the land had been taken by the Government into their possession, and that the latter had made over the greater part of it to the defendants who had since held this part. There had not been shown to have been any actual possession held of the remainder by the plaintiffs, who had thus failed as to the whole to prove the continued possession necessary to their acquiring title. UDIT NARAIN SINGH v. GOLABCHAND SAHU, 27 C. 221 (P.C.)=26 I.A. 236=7 Sar. P.C.J. 628 ... 146

(2) See LIMITATION, 27 C. 25.

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Cause of Action.

(1) See JURISDICTION, 27 C. 555.

(2) See RIGHT OF SUIT, 27 C. 793.

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Right of, to have probate revoked—See PROBATE, 27 C. 927.

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Charge.

(1) *Alteration of charge—Conviction of rioting with the common object of theft—Finding by appellate Court of different common object—Legality of conviction on such finding—Penal Code (Act* XLV *of* 1860), *ss.* 147 *and* 379—*Code of Criminal Procedure (Act* V *of* 1898), *s.* 423.—The accused were convicted by a Magistrate of theft of mangoes, and also of rioting, the common object of the unlawful assembly being the forcibly taking away of mangoes belonging to the complainant. On appeal the Sessions Judge not only found that the common object was not the taking of the mangoes but that the dispute between the parties was as to certain land. He however dismissed the appeal and confirmed the conviction. *Held* that, as the accused were convicted on a different finding of fact from that to which they were called upon to plead and to defend themselves at the trial, they were entitled to an acquittal. RAHIMUDDI v. ASGAR ALI, 27 C. 990 = 5 C.W.N. 31 ... 648

(2) *Alteration of charge on appeal—Conviction for different offence from that charged—Want of notice to accused—Penal Code (Act* XLV *of* 1860), *ss.* 143 *and* 379—*Crim. Pro. Code (Act* V *of* 1898), *s.* 423.—The accused were convicted of theft; that was the only charge which they were called upon to answer. In appeal the District Magistrate held that no theft had been committed, but he convicted the accused of being members of an unlawful assembly. *Held*, that on the trial the accused were called upon to answer only a charge of theft, they were never called upon to answer any other charge, and they therefore could not fairly be convicted on their appeal of an offence of an entirely different character. It is on the proceedings taken before the Magistrate that the facts constituting an offence for which a trial is held are made known to the accused, and the law is applied by the Magistrate to the facts established, so as to constitute the charge which the accused is called upon to answer. It therefore cannot be said that sufficient notice was given to the accused because mention of s. 147 of the Penal Code (rioting), together with theft was made in the final report of the police as the offences considered to have been established; and that the accused must have been acquainted with such report. JATU SINGH v. MAHABIR SINGH, 27 C. 660 ... 433

(3) *Joinder of—Offences of same kind not within year—Failure of justice—Code of Criminal Procedure (Act* V *of* 1898), *ss.* 233, 234 *and* 537.—*Held*, that s. 537 of the Code of Criminal Procedure can be applied to any case in which the trial has been held on charges joined together contrary to s. 234 of that Code. *In the matter of* ABDUR RAHMAN, 27 C. 839 (F.B.) = 4 C. W.N. 656 ... 549

(4) See LIMITATION ACT (XV OF 1877), 27 C. 180.

Charter Act (24 and 25 Vic., c. 104).

(1) S. 15—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 892.

(2) S. 15—See REVISION, 27 C. 126.

Chittagong Hill Tracts.

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S. 249—See SALE, 27 C. 264.

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S. 7—See APPEAL (SECOND APPEAL), 27 C. 484.

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(1) S. 2—See APPEAL (GENERAL), 27 C. 362, 670.
(2) Ss. 3, 4—See APPEAL (SECOND APPEAL), 27 C. 508.
(3) S. 11—See RIGHT OF SUIT, 27 C. 30.
(4) S. 28—See HINDU LAW (JOINT FAMILY), 27 C. 724.
(5) S. 28—See PARTIES, 27 C. 493.
(6) S. 32—See LIMITATION, 27 C. 540.
(7) S. 32—See PARTIES, 27 C. 493.
(8) S. 42—See HINDU LAW (JOINT FAMILY), 27 C. 724.
(9) S. 54—See LIMITATION, 27 C. 376, 814.
(10) Ss. 102, 103—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 217.
(11) S. 108—See RIGHT OF SUIT, 27 C. 197.

(12) *Ss. 108, 244, 314—Sale in execution of an* ex parte *decree and purchase by the decree-holder—Confirmation of the sale—Subsequent setting aside of the* ex parte *decree—Application by the subsequent purchaser in execution of another decree to set aside the sale on the ground that the* ex parte *decree had been set aside.*—Certain immoveable properties were sold in execution of an *ex prate* decree and were purchased by the decree-holder himself. After the confirmation of the sale, the decree was set aside under s. 108 of the Civ. Pro. Code at the instance of some of the defendants in the original suit. On an application under s. 244 of the Civ. Pro. Code having been made by a prior purchaser of the said properties in execution of another decree to set aside the sale held in execution of the *ex parte* decree the defence was that the application could not come under s. 244 of the Civ. Pro. Code, and that the sale could not be set aside, as it had been confirmed. *Held*, that the case was one under s. 244 of the Civ. Pro. Code; and that the *ex parte* decree having been set aside the sale could not stand, inasmuch as the decree-holder himself was the purchaser. SET UMEDMAL v. SRINATH ROY, 27 C. 810=4 C.W.N. 692 ... 530

(13) S. 157—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 217.
(14) S. 211—See MESNE PROFITS, 27 C. 951.

(15) *Ss. 228, 232 and 578—Jurisdiction of a Court where a decree has been transferred for execution to substitute the name of the transferee of the decree—Whether an order passed without jurisdiction can be cured by the provisions of s. 578 of the Civ. Pro. Code.*—An application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and the Court to which the decree has been transferred has no jurisdiction to entertain it. In a case where a decree has been transferred to another Court for execution, and that Court orders the execution to proceed after substitution of the name of the transferee of the decree, the said order is one passed without jurisdiction, and can be set aside on appeal, notwithstanding the provisions of s. 578 of the Civ. Pro. Code. AMAR CHANDRA BANERJEE v. GURU PROSUNNO MUKERJEE, 27 C. 488 ... 321

(16) S. 230—See LIMITATION, 27 C. 285.
(17) S. 232—See APPEAL (GENERAL), 27 C. 670.
(18) S. 244—See APPEAL (GENERAL), 27 C. 670.
(19) S. 244—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 810.

(20) *S. 244—Question for Court executing decree—Question between decree-holder and judgment-debtor as to saleability or otherwise of an occupancy holding.*—Under s. 244 of the Civ. Pro. Code the question as to the saleability or otherwise of an occupancy holding between the decree-holder and judgment-debtor can be determined in the execution proceedings. GAHAR KHALIPA BIPARI v. KASI MUDDI JAMADAR, 27 C. 415=4 C.W.N. 557 ... 274

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(21) S. 244—*Question for Court executing decree—Transferability of occupancy holding according to custom or usage—Saleability of occupancy holding in execution of decree.*—When an application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment-debtor is entitled, under s. 244 of the Civ. Pro. Code, to raise the question as to whether the holding is saleable according to custom or usage, and to have that question determined by the Court executing the decree. MAJED HOSSEIN v. RAGHUBUR CHOWDHRY, 27 C. 187 ... 124

(22) S. 244—*Question in execution of decree—Possession in execution of decree after sale—Question arising between the parties or their representatives—Separate suit—Appeal.*—Proceedings for the delivery of possession to the auction-purchaser after sale in execution of a decree, are proceedings in execution of the decree; and when the application for possession is resisted by the legal representative of the judgment-debtor on the allegation that portions of the property belonged to him and not to the judgment-debtor, the question raised comes under s. 244 of the Civ. Pro. Code and must be decided under that section and not by a separate suit. MADHU SUDAN DAS v. GOBINDA PRIA CHOWDHURANI, 27 C. 34=4 C.W.N. 417 ... 23

(23) Ss. 244, 281—*Party to suit—Question in execution of decree—Right of suit—Minor defendant objecting to sale in mortgage suit but withdrawing his defence.*—In a suit brought upon a mortgage bond after the death of the executant, who was the widow of the last full owner of the properties mortgaged, the present plaintiff, who was a minor at that time, appeared, represented by the manager under the Court of Wards, and denied the widow's right to mortgage the properties in dispute. He subsequently withdrew his defence, but remained a party on the record, and a decree was made in his presence. At an execution proceeding taken against the minor son of the alleged adopted son of the last full owner without any notice to the present plaintiff, some of the mortgaged properties were sold. In a suit by him (the plaintiff) for recovery of possession of the said properties, the defence was that the suit was not maintainable by virtue of the provisions of s. 244 of the Civ. Pro. Code. *Held* that inasmuch as the plaintiff was a party to the suit in which the decree was passed, his remedy, if he could object to the sale, was by an application under s. 244 of the Civ. Pro. Code, and not by a separate suit. RAM CHANDRA MUKERJEE v. RANJIT SINGH, 27 C. 242=4 C.W.N. 405 ... 160

(24) S. 244, cl. (*c*), and ss. 287, 311—See SALE, 27 C. 264.

(25) S. 266—See ATTACHMENT, 27 C. 38.

(26) Ss. 278, 281, 283—See CLAIM, 27 C. 714.

(27) S. 295—See INSOLVENCY, 27 C. 351.

(28) S. 295—See PARTIES, 27 C. 493.

(29) S. 311—See APPEAL (GENERAL), 27 C. 414.

(30) S. 311—See LANDLORD AND TENANT, 27 C. 789.

(31) S. 313—See SALE, 27 C. 264.

(32) S. 315—See PARTIES, 27 C. 493.

(33) S. 370—*Insolvent Act* (11 *and* 12 *Vic., c.* 21), *s.* 7—*Whether s.* 370 *of the Civ. Pro. Code applies to a case, where there has not been a completed bankruptcy or insolvency—Dismissal of the suit for non-appearance of plaintiff or of the Official Assignee—Civ. Pro. Code, ss.* 102, 103, 157, 371.—S. 370 of the Code of Civil Procedure does not apply to a case where there has been only an application to declare the plaintiff to a suit an insolvent and a vesting order made, but the proceedings are subsequently annulled, and the party is not declared either a bankrupt or an insolvent; therefore in such a case, where a suit has been dismissed for the non-appearance of the plaintiff or the Official Assignee on the date fixed for hearing, s. 103 of the Civ. Pro. Code applies. AMRITA LAL MUKERJEE v. RAKHALI DASSI DEBI, 27 C. 217=4 C.W.N. 294 ... 143

(34) S. 373—See APPEAL (GENERAL), 27 C. 362.

(35) Ss. 436, 437—See HINDU LAW (JOINT FAMILY), 27 C. 724.

(36) S. 443—See PROBATE, 27 C. 350.

(37) S. 462—See ACT X OF 1873 (OATHS), 27 C. 229.

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(38) Ss. 506, 578—See ARBITRATION, 27 C. 61.

(39) S. 508—See RECEIVER, 27 C. 279.

(40) S. 534—See APPEAL (SECOND APPEAL), 27 C. 508.

(41) *Ss. 556, 558—Second appeal—Order refusing to re-admit appeal—Dismissal of appeal for default—Pleader asking for time to go on with a case.*—The provisions of ss. 556 and 558 of the Civ. Pro. Code do not apply when the pleader for the appellant not merely informs the Court that he has no instructions, but makes an application for postponement, which is refused, and the appeal is thereupon dismissed. A second appeal does not, therefore, lie in such a case from an order of the first appellate Court refusing to re-admit an appeal under the provisions of s. 558 of the Code of Civil Procedure. ROBERT WATSON & CO. v. AMBICA DASI, 27 C. 529=4 C.W. N. 237 ... 348

(42) S. 575—See HINDU LAW (JOINT FAMILY), 27 C. 724.

(43) S. 578—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 488.

(44) S. 588—See APPEAL (GENERAL), 27 C. 362, 414.

(45) Ss. 594, 616 (Ch. XLV)—See PRIVY COUNCIL, 27 C. 1.

(46) S. 626—See PRIVY COUNCIL, 27 C. 333.

(47) S. 622—See APPEAL (GENERAL), 27 C. 5.

(48) S. 647—See APPEAL (SECOND APPEAL), 27 C. 484.

(49) S. 647—See PROBATE, 27 C. 350.

Civ. Pro. Code Amendment (Act VII of 1888).

See APPEAL (GENERAL), 27 C. 670.

Claim.

(1) On behalf of minor by manager of estate without sanction of Court of Wards—See LIMITATION ACT (XV OF 1877), 27 C. 242.

(2) *To attached property—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 278, 281 *and* 283—*Claim preferred by a defendant's predecessor-in-title — Claim disallowed but no suit brought within one year to set aside the order—Effect of such an adverse order as against the defendant in a suit, and how far binding —Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 11 *and* 15.—In a suit brought by the plaintiff to recover possession of certain lands by virtue of a purchase by his father, at an execution sale held by a Civil Court, it was found by the Court below that the vendor of the defendant had purchased the said lands at a sale held by a Deputy Collector for arrears of road cess, and had preferred a claim to the disputed property in the execution proceedings which led to the sale at which the plaintiff's father purchased but which was disallowed, and no suit was brought by him (the defendant's vendor) within one year to set aside the order disallowing the claim. *Held*, that the vendor of the defendant not having brought a suit within one year to set aside the order disallowing the claim, the defendant was concluded by that order, even if she was not the plaintiff in the suit, to establish her right to the property in dispute. SURNAMOYI DASI v. ASHUTOSH GOSWAMI, 27 C. 714 ...

Cognizable Offence.

See PENAL CODE (ACT XLV OF 1860), 27 C. 144.

Collector.

Under Land Acquisition Act—See FALSE EVIDENCE, 27 C. 820.

Common Object.

Finding of, different from that charged—See CHARGE, 27 C. 660.

Compensation.

(1) Application by purchaser to set aside sale or for—See SALE, 27 C. 264.

(2) See ACT I OF 1871 (CATTLE TRESPASS), 27 C. 992.

(3) See LANDLORD AND TENANT, 27 C. 570.

Complaint.

(1) *Institution of complaint and necessary preliminaries—Charge of furnishing false information in Land Acquisition Proceedings—Omission to refer to*

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particular false statement on which accusation made—Penal Code (*Act* XLV *of* 1860), *s.* 177—*Land Acquisition Act* (I *of* 1894), *ss.* 9 *and* 10.—A Magistrate issued processes for the attendance of the accused on the complaint of the Land Acquisition Deputy Collector for having given false information within the terms of s. 177 of the Penal Code and s. 10 of the Land Acquisition Act in certain written statements that they had made to the Collector. The complaint was that the written statements were false. The documents, however, contained more than one statement of fact. Neither in the complaint made by the Deputy Collector nor in his examination by the Magistrate was any reference made to any particular statement made by either of the accused as being a false statement, nor had the Deputy Collector put in the written statement upon which he desired to proceed either with his written complaint or at the time of his examination by the Magistrate : *Held*, that the complaint was bad and the case should not be allowed to proceed in its present form. The Magistrate was bound to require from the complainant the written statements on which the proceedings were founded, and also to ascertain from him the particular statement or statements on which the accusation was made. DURGA DAS RAKHIT v. UMESH CHANDRA SEN, 27 C. 985=5 C W.N. 131 645

(2) See SANCTION FOR PROSECUTION, 27 C. 452.

Compromise.

(1) *Compromise of matters in suit and of matters outside scope of suit—Authority of counsel to make such compromise—General authority — Special authority—Notice—Evidence—Statement of counsel not made on oath if objected to.*—Counsel possesses a general authority, an apparent authority which must be taken to continue until notice be given to the other side by the client that it has been determined to settle and compromise the suit in which he is actually retained as counsel. Where the compromise, however, extends to collateral matters, to matters quite outside the scope of the particular case in which counsel is engaged, in order to bind his client it must be shown, that he had from his client special authority to compromise, upon the terms upon which the compromise was effected, and the other side cannot avail themselves of the position that they did not know that it had not been given ; they are not entitled to assume, as in the case of an apparent authority, that it was given and was existing. Where counsel under a misapprehension of his client's instructions and believing himself to have authority, acts in fact without it, he cannot bind his client. Though it has been the practice in Courts in England to accept the statements of counsel made from his place at the Bar, the Court entertained great doubt whether, if that course be objected to by the opposite side, the party putting forward such a statement could insist upon its being made without the sanctity of an oath. NUNDO LAL BOSE v. NISTARINI DASSI, 27 C. 428=4 C.W.N. 169 ... 282

(2) To deprive attorney of his costs—See PRACTICE, 27 C. 269.

Confession.

Withdrawal of—See EVIDENCE, 27 C. 295.

Confiscation.

See ACT VII OF 1878 (FOREST), 27 C. 450.

Consideration.

Non-payment of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 7.

Construction.

(1) Of decree—See DECREE, 27 C. 103.

(2) Of grant—See GRANT, 27 C. 156.

(3) Of mortgage—See MORTGAGE (GENERAL), 27 C. 938.

(4) Of will—See HINDU LAW (ADOPTION), 27 C. 996.

Contempt.

Of Court—Penal Code (*Act* XLV *of* 1860), *s.* 174—*Non-attendance on service of summons—Appearance by* mukhtar—*Crim. Pro. Code* (*Act* V *of* 1898), *s.* 205.—In a summons case on the day fixed for trial an appearance was

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made on behalf of an accused person by his *mukhtar* who asked the Magistrate under s. 205 of the Code of Criminal Procedure to dispense with the personal attendance of the accused. The Magistrate, however, regarding the non-attendance of the accused as a contempt of Court called upon him to show cause why he should not be prosecuted under s. 174 of the Penal Code for non-attendance on service of summons. *Held*, that the accused did make an appearance though not a personal appearance on service of summons; but that he did not personally attend should not under the circumstances have been regarded as an offence under s. 174 of the Penal Code. DURGA DAS RAKHIT v. UMESH CHUNDRA SEN, 27 C. 985=5 C.W.N. 131 ... 645

Continuous Offence.

See KIDNAPPING, 27 C. 1041.

Contract.

(1) Breach of—See ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT), 27 C. 131.

(2) *Of sale—Want of assent—Broker's bought and sold notes.*—To contract through a broker, to sell a quantity of paddy at a price stated, the plaintiff firm signed the sold note. This was taken by the broker to the defendant firm, of which a member, before signing the bought note, wrote in Chinese characters, not understood by the vendor, a term as to quality. This was to the effect that the paddy was to be without yellow grains and not wet. A part delivery was made of paddy not answering this description. For this the defendant firm made a part payment at a reduced rate. Of the rest they refused to take delivery when tendered, because it was not of the quality contracted for. *Held*, that the plaintiff's suit for the balance of the price of the part delivered, and for damages for non-acceptance of delivery of the rest, failed. If the plaintiffs—neither they nor their broker understanding Chinese—did not assent to the terms written by the defendant, then there was no contract entered into to buy. If, on the contrary, the plaintiffs had assented to that term, then the paddy was not of the quality required by the contract. AHSHAIN SHOKE v. MOOTHIA CHETTY, 27 C. 403 (P.C.)=27 I.A. 30=4 C.W.N. 453=2 Bom. L.R. 556=7 Sar. P.C.J. 669 ... 266

(3) Relating to property of minor—See SPECIFIC PERFORMANCE, 27 C. 276.

(4) See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 358, 468.

Contract Act (IX of 1872).

S. 74—See INTEREST, 27 C. 421.

Conviction.

Of offence not charged—See CHARGE, 27 C. 660.

Corroboration.

(1) See EVIDENCE, 27 C. 295.

(2) See EVIDENCE ACT (I OF 1872), 27 C. 118.

Co-sharer.

See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 473.

Costs.

(1) Of attorney—See PRACTICE, 27 C. 269.

(2) See PROBATE, 27 C. 927.

(3) See SALVAGE, 27 C. 860.

Counsel.

Power of—See COMPROMISE, 27 C. 428.

Court of Wards.

Want of sanction of—See LIMITATION ACT (XV OF 1877), 27 C. 242.

Covenant.

As to payment of interest—See MORTGAGE (GENERAL), 27 C. 938.

Cow.

Slaughter of—See ACT V OF 1861 (POLICE), 27 C. 655.

Creditors. PAGE

Transaction in fraud of—See BENAMI TRANSACTION, 27 C. 231.

Criminal Force.

Use of—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 174.

Crim. Pro. Code (Act V of 1898).

(1) S. 4, cl. (*f*)—See PENAL CODE (ACT XLV OF 1860), 27 C. 144.

(2) S. 55—See ACT XI OF 1878 (ARMS), 27 C. 692.

(3) S. 56—See ARREST, 27 C. 320.

(4) S. 59—See ARREST, 27 C. 366.

(5) Ss. 68, 79—See ARREST, 27 C. 457.

(6) S. 80—See ARREST, 27 C. 320.

(7) S. 103—See ACT XI OF 1878 (ARMS), 27 C. 692.

(8) S. 106—See RECOGNIZANCE TO KEEP PEACE, 27 C. 983.

(9) S. 110—See SECURITY FOR GOOD BEHAVIOUR, 27 C. 656, 662, 781, 993.

(10) S. 112—See SECURITY FOR GOOD BEHAVIOUR, 27 C. 781.

(11) Ss. 117, 118—See SECURITY FOR GOOD BEHAVIOUR, 27 C. 781.

(12) S. 123—See SECURITY FOR GOOD BEHAVIOUR, 27 C. 656.

(13) *Ss.* 144, 145—*Dispute regarding right to property—Power of Magistrate to determine rights and shares of parties—Civil Court—Magistrate, Jurisdiction of.*—It is not because private parties or members of the same family dispute regarding their respective rights to land or crops, that a Magistrate is called upon to interfere. A Magistrate cannot take upon himself to decide questions of fact and Mahomedan law, so as to satisfy himself as to what are the actual rights of the parties to the lands in dispute. If he has good reasons to believe that such a dispute is likely to cause a breach of the peace, the law enables him to ascertain and maintain actual possession, or, if it is shown that the members of the family are inclined to break the peace, he can bind them all over to keep the peace. Where there was a dispute between the parties, who were related to one another, as to the amount of their shares to certain property which was claimed on the one hand to be joint in certain shares, and on the other hand to exclusively belong to the other party, and no proceedings had been taken under s. 145 of the Code of Criminal Procedure, nor was there any thing to show that there was any probability of a breach of the peace, the Magistrate passed the following order: " The applicants must not plough more than 12 annas of the land." *Held*, that such an order could not properly fall within s. 144 of the Code of Criminal Procedure, as an order under that section could only be passed on some emergency and would have effect for only two months. The present order in its operation would have effect and was intended to have effect, until the parties went to a Civil Court to settle their disputes, and no emergency was even suggested. The order, therefore, was entirely without any authority of law and must be set aside. DAIMULLA TALUKDAR v. MAHARULLA TALUKDAR, 27 C. 918 ... 600

(14) *Ss.* 144, 145, 146—*Dispute in respect of colliery—Order under s.* 144—*Prohibition to both parties from exercising right of possession—Proceedings under s.* 145 *of the Code of Criminal Procedure—Date of possession.*—On the 10th of November 1899, the Magistrate passed an *ex parte* order under s. 144 of the Code of Criminal Procedure by which both parties to a dispute were prohibited from exercising any right of possession in respect of a colliery. Subsequently proceedings under s. 145 of the Code were instituted in respect of the same colliery and between the same parties. On the 29th of January 1900, the Magistrate having found that the second party had been in possession on the 10th of November 1899, passed an order declaring them to be in possession. *Held*, that the proper way of dealing with this case in interpreting the Magistrate's order was to hold that, whereas by reason of the operation of his order under s. 144 of the Code of the 10th November 1899, no evidence could be offered to show the possession of either party from that date up to the 29th of December, he was consequently obliged to ascertain the possession immediately before this order and to regard his intervention as an attachment suspending the previous possession whatever it might be, but that, at the same time, the

Crim. Pro. Code (Act V of 1898)—(*Continued*). PAGE

former possession continued, and although the lawful exercise of its rights had been forbidden for a time, the possession had never ceased to exist. That the order of the Magistrate was correct. JOYANTI KUMAR MOOKERJEE v. MIDDLETON, 27 C. 785=4 C.W.N. 562 ... 514

(15) *S.* 145—*Dispute regarding right to collect rents—Jurisdiction of Magistrate—Appointment of Receiver of a joint estate—Joint owners governed by Mitakshara Law.*—There is no want of jurisdiction in a Magistrate to proceed under s. 145 of the Crim. Pro. Code, because the dispute is one regarding the right to the collection of rents between joint owners governed by the Mitakshara School of Hindu Law. Nor can the appointment of a Receiver of the joint estate, subsequent to the passing of the order by the Magistrate, affect the question of the jurisdiction of the Magistrate at the time when he passed the order. SRI MOHAN THAKUR v. NARSING MOHAN THAKUR, 27 C. 259=4 C.W.N. 420 ... 171

(16) *S.* 145—*Order instituting proceedings under s.* 145 *of the Code of Criminal Procedure* (*Act V of* 1898)—*Contents of such order—Irregularity in order, making proceedings without jurisdiction—Order of Criminal Court as to possession.*—Unless a Magistrate complies strictly with the terms of s. 145 of the Code of Criminal Procedure by stating in his written order all the particulars necessary to enable him to act under that section, his proceedings are without jurisdiction. It is not sufficient that the Magistrate should have before him a police report and that he should have given orders thereon that a written order be drawn up within the terms of s. 145. It is his duty to draw up, or have drawn up, an order which in all respects satisfies the requirements of the law. It is absolutely necessary that the written order should be correct and complete in its terms. MOHESH SOWAR v. NARAIN BAG, 27 C. 981 ... 642

(17) Ss. 145, 146—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 785.

(18) *Ss.* 145, 429—*Disputes as to ownership of land—Collection of rents—Zemindars and tenants* versus *rival zemindars and tenants—Necessary parties to proceedings under s.* 145 *of the Code of Criminal Procedure—"Parties concerned," meaning of—Omission to add necessary parties—Addition of parties during proceedings—Revision and alteration of character of such proceedings by succeeding Magistrate—Jurisdiction of Magistrate—Revision, power of High Court to interfere—Charter Act* (24 *and* 25 *Vic.*, *c.* 104), *cl.* 15.—The words in s. 145 of the Code of Criminal Procedure, "parties concerned" in a dispute do not necessarily mean only the parties who are disputing but include also persons who are interested in or claiming a right to the property in dispute. It is the duty of the Magistrate on the materials before him to ascertain, so far as he can, who are the persons interested in or claiming a right to the property in dispute, and to give notice to them all, so that the whole matter so far as his Court is concerned, may be disposed of in one proceeding. Where there was a dispute as to the ownership of lands between certain zemindars and their tenants on the one side and other zemindars and their tenants on the other, and the real matter for determination was not merely which of the two parties of zemindars was entitled to collect the rents of the lands, but also which set of rival tenants was entitled to hold actual possession of the lands, and in a proceeding under s. 145 of the Code of Criminal Procedure the zemindars only were made parties and not the tenants. *Held* (AMEER ALI and STANLEY, JJ.) that the tenants were necessary parties to the proceeding and the omission to make them parties went to the root of the case and was an illegality affecting jurisdiction which would justify the High Court in setting aside the order. PRINSEP, J.—The omission to join the tenants could not vitiate an order as between the zemindars on an objection that it was without jurisdiction and that no question of jurisdiction arose in the matter. The High Court's powers are under the Charter Act and these could be exercised only in respect of jurisdiction. Where a Magistrate recorded proceedings under s. 145 of the Code of Criminal Procedure and his successor on the same materials revised those proceedings altering their entire character, converting the dispute, which was originally stated to be a dispute regarding the actual possession of the land into a dispute regarding the collection of rent between the persons named therein. *Held* (AMEER ALI and STANLEY, JJ.), that it was an abuse of jurisdiction on the part of the Magistrate so to alter the

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proceedings, and an abuse which would justify the intervention of the High Court under the powers conferred by the Charter. AMEER ALI, J.—The High Court has the power to interfere both under its revisional jurisdiction as also under s. 15 of the Charter Act. LALDHARI SINGH v. SUKDEO NARAIN SINGH, 27 C. 892=4 C.W.N. 613 ... 583

(19) Ss. 161 and 164—See EVIDENCE, 27 C. 295.

(20) S. 165—See ACT XI OF 1878 (ARMS), 27 C. 692.

(21) S. 190—See SANCTION FOR PROSECUTION, 27 C. 820.

(22) S. 490, cl. (*c*)—See FALSE EVIDENCE, 27 C. 455.

(23) S. 192—See MAGISTRATE, 27 C. 798.

(24) S. 195—See SANCTION FOR PROSECUTION, 27 C. 452, 820.

(25) S. 202—See FALSE CHARGE, 27 C. 921.

(26) S. 202—See MAGISTRATE, 27 C. 798.

(27) S. 203—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 658.

(28) S. 203—See FALSE CHARGE, 27 C. 921.

(29) S. 203—See MAGISTRATE, 27 C. 798.

(30) S. 204—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 658.

(31) S. 204—See MAGISTRATE, 27 C. 798.

(32) S. 205—See CONTEMPT, 27 C. 985.

(33) Ss. 233, 234—See CHARGES, 27 C. 839.

(34) Ss. 254, 256, 257—See WITNESS, 27 C. 370.

(35) S. 288—See EVIDENCE, 27 C. 295.

(36) S. 307—See REFERENCE, 27 C. 295.

(37) S. 337—See PARDON, 27 C. 137.

(38) S. 339—See PARDON, 27 C. 137.

(39) S. 340—See SECURITY FOR GOOD BEHAVIOUR, 25 C. 656.

(40) S. 341—*Accused person deaf and dumb and unable to understand proceedings in Court—Commitment—Report by Magistrate of such proceedings to High Court—Power of High Court to pass final orders on such report—Discretion of High Court to order Sessions trial to be held or not—Code of Criminal Procedure (Act* V *of* 1898), *s.* 471—*Sessions Court—Penal Code (Act* XLV *of* 1860), *s.* 302.—An accused person who had been for some time confined in a lunatic asylum was tried and committed to the Sessions by a Deputy Magistrate on a charge of murder. The accused was deaf and dumb, and could not be made to understand the proceedings which had been taken. On the proceedings being forwarded to the High Court s. 341 of the Code of Criminal Procedure it was held that the law does not contemplate that the Sessions trial should necessarily take place: that it is discretional with the High Court on a commitment made to order the Sessions trial to be held and the High Court must consider whether any benefit would be likely to result especially to the accused by such trial. The High Court in this case having come to the conclusion that no benefit would be likely to result to the accused by his being tried by the Court of Session, found that the accused was guilty of the alleged murder, but that he was by reason of unsoundness of mind not responsible for his action, and directed him to be kept in the District Jail to await the orders of Government. QUEEN-EMPRESS v. SOMIR BOWRA, 27 C. 368 =4 C.W.N. 421 ... 243

(41) S. 370—See ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT), 27 C. 131.

(42) S. 370, cl. (*i*)—See PRESIDENCY MAGISTRATE, 27 C. 461.

(43) Ss. 392, 393—See MESNE PROFITS, 27 C. 951.

(44) S. 423—See CHARGE, 27 C. 990.

(45) S. 423—See REVISION, 27 C. 126.

(46) S. 423, cl. (*b*)—See SESSIONS JUDGE, 27 C. 172.

(47) S. 428—See APPEAL (CRIMINAL), 27 C. 372.

(48) S. 429—See SUMMARY TRIAL, 27 C. 501.

(49) S. 435—See REVISION, 27 C. 126.

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(50) S. 437—See SECURITY FOR GOOD BEHAVIOUR, 27 C. 662.

(51) *S. 437—Further inquiry—Offence not charged—Other persons not before Magistrate—Code of Criminal Procedure (Act V of 1898), ss. 203, 204—Penal Code, ss. 144 and 426.*—On a complaint made to the Deputy Magistrate he convicted one of the accused H, of mischief. On application made to the Sessions Judge he directed a further inquiry to be made by the Magistrate into another offence, under s. 144 of the Penal Code, in respect of H, no charge of any such offence having been made at any time against him. The Sessions Judge also directed a further inquiry against other persons, who apparently were mentioned in the complaint, but who had not been summoned to appear before the Magistrate. *Held*, that the order of the Sessions Judge was without jurisdiction, not being within the powers described by s. 437 of the Code of Criminal Procedure. HAR KISHORE DASS v. JUGUL CHUNDER KABYARATHNA BHUTTACHARJEE, 27 C. 658 — 432

(52) S. 439—See REVISION, 27 C. 126, 820.

(53) S. 439—See SUMMARY TRIAL, 27 C. 501.

(54) S. 476—See FALSE CHARGE, 27 C. 921.

(55) S. 476—See FALSE EVIDENCE, 27 C. 820.

(56) S. 480—See SANCTION FOR PROSECUTION, 27 C. 452.

(57) *S. 522—Restoration of possession of property—Use of criminal force—Penal Code (Act XLV of 1860), s. 350.*—In order to support an order under s. 522 of the Crim. Pro. Code (V of 1898) there must be a finding that the dispossession was by the use of criminal force as defined in s. 350 of the Penal Code. ISHAN CHANDRA KALLA v. DINA NATH BADHAK, 27 C. 174= 4 C.W.N. 307 ... 115

(58) S. 526—See FALSE EVIDENCE, 27 C. 820.

(59) S. 537—See CHARGE, 27 C. 839.

(60) S. 537—See SECURITY FOR GOOD BEHAVIOUR, 27 C. 781.

Crops.

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Custom.

Or usage as to transferability of occupancy right, question of—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 187.

Dakhilas.

See MESNE PROFITS, 27 C. 951.

Damages.

(1) For use and occupation—See RENT, 27 C. 239.

(2) Suit for—See LANDLORD AND TENANT, 27 C. 67.

(3) See MALICIOUS PROSECUTION, 27 C. 532.

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See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 368.

Declaration.

(1) See ACT I OF 1869 (OUDH ESTATES), 27 C. 344.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 242.

(3) See INSURANCE, 27 C. 593.

(4) See RIGHT OF SUIT, 27 C. 30.

Declaratory Decree.

Suit for—See GRANT, 27 C. 156.

Decree.

(1) *Construction of decree—Assignment of villages, part of an impartible estate—Maintenance of a member of a junior branch of a joint Hindu family—Agreement—Arbitration award, decree and settlement thereon—Revenue, by whom payable.*—A talukhdar owning an impartible inheritance was the head of a joint Hindu family, of which the defendant, his first cousin, was a member in a junior branch. In 1864 they came to terms as to the latter's claims upon the ancestral estate. A decree in that year founded

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upon the award of arbitrators between them declared the talukhdar's ownership, and the assignment by him of eleven villages to the junior member, free of liability in respect of the revenue. These terms were entered in an administration paper, or *wajib-ul-arz*, of the talukh before the settlement of 1867, in the record whereof they were also entered. And they were referred to in a sanad granted to the talukhdar. When the settlement of 1889 was in progress the profits of the eleven villages and the Government demand thereon had greatly increased; and for this jama the talukhdar was liable without any proportionate increase of profit from the eleven villages. In 1881 the talukhdar sued for a declaration that the defendant's right in the villages consisted only of a certain amount of allowance for maintenance derivable from them. He also claimed that the defendant should repay to him a sum which he had paid for local cesses. The defence was that the defendant's right in the eleven villages had been conclusively settled in the above proceedings. *Held*, that by the true construction of the decree of 1864, which was the foundation of the title of either party, the profits of the eleven villages belonged to the defendant, and that the revenue was to be paid, as between the two, by the plaintiff with the enhancements without benefit to him from the increase in the yield of the land. The principle of the judgments below was that the question to be decided was of the kind where the head of a family and a junior member dispute the amount of maintenance that should be paid. But the property assigned in this case was not of the variable character which belonged to an ordinary allowance for maintenance, and there was nothing to show that the Courts had authority to disturb settled arrangements on the ground of their being originally based on claims to maintenance. The talukha was vested in the plaintiff subject to the right of the defendant to hold the eleven villages, and as between them, the former was liable for the jama and the latter for the local rates and cesses. LOKNATH v. BISSESSARNATH, 27 C. 103 (P.C.) = 26 I.A. 268 = 7 Sar. P.C. J. 569 ... 68

(2) *Ex parte*, sale in execution of—See RIGHT OF SUIT, 27 C. 197.

(3) For sale of mortgaged property making defendant personally liable in case of insufficiency—See LIMITATION, 27 C. 285.

(4) For winding up, and for an account—See PARTNERSHIP, 27 C. 93.

(5) See APPEAL (GENERAL), 27 C. 670.

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Defamation.

Statements made by persons in the course of their evidence as witnesses in Court of Justice—Relevancy of statements to issue in case—Penal Code (Act XLV *of* 1860*)*, s. 500.—Where certain statements alleged to be defamatory were made by certain persons in the course of their evidence as witnesses in a Court of Justice and were relevant to the issue in the case under enquiry: *Held*, that such persons could not be prosecuted for defamation in respect of those statements. WOOLFUN BIBI v. JESARAT SHEIKH, 27 C. 262 ... 173

Delivery.

Of deed of sale—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 7.

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(1) Of Court—See MESNE PROFITS, 27 C. 951.

(2) See PRACTICE, 27 C. 57, 60 N.

(3) See RECEIVER, 27 C. 279.

(4) See REVISION, 27 C. 820.

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Regarding right to collect rents—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 259.

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See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 535.

Ejectment.

See LANDLORD AND TENANT, 27 C. 570, 774.

Ekrarnamah.

Registration of—See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 358.

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O. XVI, rr. 11, 48—See PARTIES, 27 C. 493.

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(1) Of rent—See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 476.

(2) Of sentence—See SENTENCE, 27 C. 175.

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In account-books, admissibility of, in evidence—See EVIDENCE ACT (I OF 1872), 27 C. 118.

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Evidence.

(1) After report of amin, discretion of Court to take—See MESNE PROFITS, 27 C. 951.

(2) *In criminal case—Crim. Pro. Code (Act* V *of* 1898), *ss.* 161, 164, 288 *and* 307—*Impropriety of taking down statements of persons immediately before their arrest—Impropriety of recording statements of witnesses with a view to fix them to those statements—Confession retracted—Evidence of witnesses retracted—Corroboration—Deposition before Committing Magistrate read under s.* 288, *Crim. Pro. Code.*—Where there is evidence in the hands of a police officer upon which he is bound to arrest a person, it is improper for him to obtain a statement from that person, professedly under s. 161 of the Crim. Pro. Code, and reduce it to writing; and by virtue of s. 25 of the Evidence Act such statement is inadmissible in evidence. It is also improper for a police officer to send a person practically under custody, who is in the position of a witness, to have his statement recorded by a Magistrate under s. 164 of the Crim. Pro. Code, with the view of fixing him to that statement at the time when judicial proceedings are subsequently taken. The voluntary character of such a statement cannot but be doubted, and when retracted in the Court of Sessions, the Judge should not bring the statement on to the record under s. 288 of the Crim. Pro. Code without making proper inquiry. It is not safe to convict an accused person on his retracted confession standing by itself uncorroborated, or on the statements of witnesses brought in under s. 288 of the Crim. Pro. Code without independent corroborating testimony; nor can these two be joined together and held as mutually corroborating each other so as to justify a conviction based on them. QUEEN-EMPRESS *v.* JADUB DAS, 27 C. 295 = 4 C.W.N. 129 ... 194

(3) *In criminal case—Evidence of bad character—Belonging to a gang of persons associated for the purpose of habitually committing theft—Penal Code (Act* XLV *of* 1860), *s.* 401—*Evidence Act* (I *of* 1872), *s.* 14 *and s.* 54 *as amended by Act* III *of* 1891.—The character of the accused not being a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, punishable under s. 401 of the Indian Penal Code, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence. Where it was proved that certain persons were found together at some distance from their houses, that they were all intimately connected with one another and were in the habit of visiting *melas* together, that one of them was arrested in the act of picking a pocket, and that when they were arrested many of them gave false names and false addresses. *Held*, they could not be convicted under s. 401 of the Indian Penal

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Code, there being no proof that they belonged to a gang of persons associated for the purpose of habitually committing theft. MANKURA PASI v. QUEEN-EMPRESS, 27 C. 139=4 C.W.N. 97 ... 92

(4) Power of Judge in dealing with—See REFERENCE, 27 C. 295.

(5) Secondary—See EVIDENCE ACT (I OF 1872), 27 C. 639.

(6) See ACT VIII OF 1897 (REFORMATORY SCHOOLS), 27 C. 133.

(7) See APPEAL (CRIMINAL), 27 C. 372.

(8) See COMPROMISE, 27 C. 428.

(9) See EVIDENCE ACT (I OF 1872), 27 C. 118.

(10) See FALSE EVIDENCE, 27 C. 455.

(11) See INSURANCE, 27 C. 593.

(12) See PROBATE, 27 C. 521.

(13) See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 468.

(14) See TITLE, 27 C. 943.

Evidence Act (I of 1872).

(1) S. 14—See EVIDENCE, 27 C. 139.

(2) S. 34—*Admissibility of books of account containing entries after transaction—Corroborative evidence.*—By s. 34 of the Indian Evidence Act, 1872, the admissibility of books of account regularly kept in the course of business is not restricted to books in which entries have been made from day to day, or from hour to hour, as transactions have taken place. The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards make them irrelevant. The course of business in keeping the accounts in the office of a talukhdari estate was that monthly accounts were submitted by karindas at the head office where they were abstracted and entered in an account book, under the date of entry, that being in some cases many days after the transaction of payment or receipt; but the entries were made in their proper order, on the authority of the officer whose duty it was to receive or pay the money. *Held*, that the entry in the account book was admissible as corroborative evidence of oral testimony to the facts of a payment, for what it was worth, objection being only to be made to its weight, not to its relevance under s. 34. The opinion expressed in the judgment in 4 B. 576, against the reception of an account book containing an entry not made at the time of the transaction was not approved. DEPUTY COMMISSIONER OF BARA BANK v. RAM PARSHAD, 27 C. 118 (P.C.)=26 I.A. 254=4 C.W.N. 147=7 Sar. P.C.J. 586 ... 77

(3) Ss. 40 and 44—See FRAUD, 27 C. 11.

(4) S. 54—See EVIDENCE, 27 C. 139.

(5) Ss. 65, 66, 74, 79, 86—*Foreign State, judicial proceedings in—Record not certified as specified in s. 86—Secondary evidence—Public document, contents of s. 74.*—The record of proceedings in a Court of Justice is presumed to be genuine and accurate, if it is certified as directed by s. 86 of the Evidence Act. But the proceedings may be proved by an official of the Court speaking to what takes place in his presence and also to an uncertified record thereof. The latter thereby becomes secondary evidence under ss. 65 and 66 of the certified record (being a public document under s. 74) admissible without notice to the adverse party when the person in possession thereof is out of the jurisdiction. HARANUND CHETLANGIA v. RAM GOPAL CHETLANGIA, 27 C. 639 (P.C.)=27 I.A. 1=2 Bom. L.R. 562=4 C.W.N. 429=7 Sar. P.C.J. 648 ... 419

(6) S. 70—See TRANSFER OF PROPERTY ACT (IV of 1882), 27 C. 190.

Evidence Act Amendment Act (III of 1891).

See EVIDENCE, 27 C. 139.

Execution.

Of deed, admission of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 190.

Execution of Decree.

(1) Application for—See LIMITATION ACT (XV OF 1877), 27 C. 210, 709.

(2) Question in—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 34, 187.

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(3) See APPEAL (GENERAL), 27 C. 414, 670.
(4) See APPEAL (SECOND APPEAL), 27 C. 484.
(5) See ATTACHMENT, 27 C. 38.
(6) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 242, 488, 810.
(7) See JURISDICTION, 27 C. 272.
(8) See MESNE PROFITS, 27 C. 951.
(9) See SALE, 27 C. 407, 545.

Executor.

See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 27 C. 683.

Ex parte Decree.

See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 810.

Extortion.

See ACCOMPLICE, 27 C. 925.

False Charge.

Prosecution for making—Necessity of examination of complainant—Dismissal of complaint—Order for judicial inquiry or report without examining complainant, legality of—Penal Code (*Act* XLV *of* 1860), *s.* 211—*Code of Criminal Procedure* (*Act* V *of* 1898), *ss.* 202, 203 *and* 476.—Where a Magistrate after having examined the complainant and without hearing his witnesses or dismissing the complaint ordered the complainant to be prosecuted under s. 211 of the Penal Code : *Held*, that the Magistrate's order was without jurisdiction. Where a complainant whose complaint had been reported false by the police, complained to the Magistrate and asked him to try the complaint, and the Magistrate did not examine the complainant himself, but made over the case to a Subordinate Magistrate for judicial inquiry or report. *Held* that the Magistrate had no authority for this procedure. A complainant must be examined by the Magistrate who receives the complaint, or by some Magistrate to whom he has transferred the case. When a complainant has been examined he is entitled to have the person accused brought before the Magistrate, and it is only when the Magistrate has reason not to believe the truth of the complaint from his examination that this can properly be refused and an investigation held. MAHADEO SINGH v. QUEEN-EMPRESS, 27 C. 921 ... 602

False Evidence.

(1) *Court—Collector under Land Acquisition Act—Power of such Collector to administer oath or require verification — Deputy Collector under Land Acquisition Act—Judicial Officer—Revenue Court—Overestimate of value of land—False statement—Crim. Pro. Code* (*Act* V *of* 1898), *ss.* 476 *and* 526—*Penal Code* (*Act* XLV *of* 1860), *ss.* 193, 196, 199, 467, 468 *and* 471—*Land Acquisition Act* (I *of* 1894), *s.* 53.—The expression "the Court" in the Land Acquisition Act does not include a Collector, nor is there any authority given to the Collector to administer an oath or to require a verification. It is a false statement made under a verification that constitutes an offence under s. 193 of the Penal Code, not a verification on oath or solemn affirmation. The Deputy Collector acting under the Land Acquisition Act is not a Judicial Officer ; he cannot properly be regarded as a Revenue Court within the terms of s. 476 of the Code of Criminal Procedure ; his proceedings under the former Act are not regulated by the Code of Civil Procedure ; nor is he right in requiring a petition put in before him to be verified in accordance with that Code, so as to make any false statement punishable as perjury. The Deputy Collector is not in a position to pass any final order in the matter of value of the land or the right to claim the price fixed ; a party dissatisfied can claim a reference to the Civil Court whose duty it is to settle the matter in dispute judicially ; therefore, to subject parties, who claimed the right to such a reference, to a criminal prosecution, when the matters on which the Deputy Collector had formed an opinion as a Revenue officer under the Land Acquisition Act must be submitted to the determination of a Court is obviously premature and improper, and is almost certain to operate very prejudicially towards them in the trial before the Civil Court of the same matter. In

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proceedings under the Land Acquisition Act what may be found to be an exaggeration or overestimate of the value of land cannot properly constitute a false statement, which would demand a prosecution for perjury, and the fact that, some years before, the land was offered for sale at a much lower price is no sufficient ground for imputing such an offence. DURGA DASS RAKHIT v. QUEEN-EMPRESS, 27 C. 820 ... 537

(2) *Examination on oath of person by Magistrate for purpose of obtaining information in order to take proceedings—Whether such person a witness—Contradictory statement made by such person at trial as witness—Code of Criminal Procedure* (*Act* V *of* 1898). s. 190, *cl.* (*e*)—*Indian Oaths Act* (X *of* 1873), *s.* 5—*Penal Code* (*Act* XLV *of* 1860), *ss.* 191 *and* 193.—*Held*, that where an accused person was examined by a Magistrate for the sake of obtaining information on which proceedings could be taken, the Magistrate, although he might examine him to obtain information, could not legally examine him on oath, nor could the accused be said at that stage of the proceedings to be a witness even though he were examined on oath. There was no authority that being so examined the accused was bound by any express provision of law to state the truth. Consequently any charge for giving false evidence founded on this statement was bad, and it therefore followed that a conviction and sentence founded on this statement, as being contrary to another statement made by the accused when examined as a witness at the trial, without any proof of finding that the second statement was false, could not be maintained. HARI CHARAN SINGH v. QUEEN-EMPRESS, 27 C. 455=4 C.W.N. 249 ... 299

(3) Prosecution for giving—See PARDON, 27 C. 137.

False Information.

(1) Charge of furnishing—See COMPLAINT, 27 C. 985.

(2) See SANCTION FOR PROSECUTION, 27 C. 452.

Farrukshyari Property.

See ACT II OF 1886 (INCOME TAX), 27 C. 674.

Ferry.

Tolls—See RENT, 27 C. 239.

Fine.

(1) *Daily payment of fine, order for—Illegality of such order.*—An order for payment of a daily fine is illegal inasmuch as it is an adjudication in respect of an offence which has not been committed when such order in passed. RAM KRISHNA BISWAS v. MOHENDRA NATH MOZUMDAR, 27 C. 565 ... 371

(2) See ACT I OF 1871 (CATTLE TRESPASS), 27 C. 992.

Firm.

Liability of members of—See STAMP ACT (I OF 1879), 27 C. 324.

Foreign State.

See EVIDENCE ACT (I OF 1872), 27 C. 639.

Fornication.

See MAHOMEDAN LAW (LEGITIMACY), 27 C. 801.

Fraud.

(1) *Pleading fraud—Evidence Act* (I *of* 1872), ss. 40 *and* 44—*Existence of a previous judgment* inter partes—*Relevant fact—Competency of any party against whom such judgment obtained to prove in a suit between the same parties, that it was obtained by fraud.*—In a suit brought by *A* against *B* for *khas* possession of a tank, the plaintiff put in a decree based on a compromise in a previous suit between him and the defendant, to prove his right to *khas* possession. The defence (*inter alia*) was that the decree was a fraudulent one. *Held*, that under s. 54 of the Evidence Act (I of 1872), the defendant could show that the decree was obtained by fraud. RAJIB PANDA v. LAKHAN SENDH MAHAPATRA, 27 C. 11=3 C.W.N. 660 ... 8

(2) Successfully effected—See BENAMI TRANSACTION, 27 C. 231.

(3) See RIGHT OF SUIT, 27 C. 197.

Full Bench. PAGE

Power in criminal case to send back as to referring Bench for final disposal—Rules of High Court, Appellate Side, Ch. 5, r. 5.—The Full Bench has power in a criminal case, after deciding the question referred, to send back the case to the referring Bench for final disposal under r. 5, Ch. 5, of the Rules of the High Court, Appellate Side. *In the matter of* ABDUR RAHMAN, 27 C. 339 (F. B.)=4 C. W. N. 656 ... 549

Further Inquiry.

(1) Order for—See REVISION, 27 C. 126.

(2) See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 658.

(3) See SECURITY FOR GOOD BEHAVIOUR, 27 C. 662.

Gang.

Of persons habitually committing theft—See EVIDENCE, 27 C. 139.

Grant.

Construction of grant—Grant by zemindar of estate for maintenance—Pottah "dawami" made to a lessee by the grantee in excess of his estate to what extent effectual, from circumstances—Suit for possession—Limitation Act (XV *of* 1877), *sch.* II, *art.* 91—*Suit for declaratory decree—Specific Relief Act* (I *of* 1877), *ss.* 39—*Adverse possession.*—A grant of a village for maintenance was made by a zemindar to his nephew, operating only for life. The grantee survived the grantor, and by *ikrarnama* acknowledged the succeeding zemindar to be entitled to the village. The grantee had, however, already executed a pottah, described therein as permanent, to a lessee. The latter obtained possession, and from him after the death of the original grantee for life the zemindars who succeeded the grantor accepted rent at the rate stipulated in the pottah, and did not disturb his possession. This suit after the death of the lessee claimed the village as part of the inherited zemindari, the defence being that the lease was perpetual. *Held*, (1) that the original grant not having extended to more than the life of the grantee, the pottah was void as against the successor in title of the grantor, and not merely voidable after the grantee's death. The acceptance of rent at the rate in the pottah could not have the effect of confirming it in its entirety, which, according to the construction of the High Court, would have been for a permanent estate. The duration of the pottah could not exceed that of the original grant; nor could an admission, taken by the High Court to have been that the acceptance of rent had confirmed the permanency of the lease, preclude the claim for legal rights, even supposing that admission to have been made. The matter in contest was as to the circumstances under which the lessee was allowed to remain in possession, and their legal effect. And, on the evidence, the lessee had been allowed to remain as a mokurrari tenant for his life. (2) The suit for possession was not barred under art. 91 of the Limitation Act (XV of 1877) on the ground that a decree declaratory of title to have the pottah cancelled might have been sued for in the lessee's lifetime under s. 39 of the Specific Relief Act, 1877. (3) The possession of a tenant for life is not rendered adverse within the meaning of Act XV of 1877 by a notice from the tenant that he claims to be holding on a perpetual or hereditary tenure. BENI PERSHAD KOERI v. DUDHNATH ROY, 27 C. 156 (P.C.)=26 I.A. 216=4 C.W.N. 274=7 Sar. P.C.J. 580 ... 103

Grievous Hurt.

Conviction of—See RIOTING, 27 C. 566.

Guardian.

Power of, to bind minor in a suit—See ACT X OF 1873 (OATHS), 27 C. 229.

Hereditary Right.

To officiate as priest—See RIGHT OF SUIT, 27 C. 30.

High Court.

(1) *Jurisdiction of—Chittagong Hill Tracts—Conviction of offences committed within Chittagong Hill Tracts—Appeal from sentence in such a case—Chittagong Act* (XXII *of* 1860), *s.* 1—*Penal Code* (*Act* XLV *of* 1860), *ss.* 379 *and* 457.—There is no jurisdiction in the High Court to hear appeals in

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respect of sentences passed on conviction of offences committed within the districts known as the Chittagong Hill Tracts. QUEEN-EMPRESS v. SONAI MUGH, 27 C. 654 ... 428

(2) Power of—See APPEAL (GENERAL), 27 C. 5.

(3) Power of—See REVISION, 27 C. 126, 820.

(4) Sanction of, for prosecution—See PARDON, 27 C. 137.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—CUSTOM.
4.—DEBTS.
5.—GIFT.
6.—IMPARTIBLE ESTATES.
7.—JOINT FAMILY.
8.—MAINTENANCE.
9.—MARRIAGE.
10.—MINORITY.
11.—PARTITION.
12.—SUCCESSION.
13.—WIDOW.
14.—WILL.

———**1.—Adoption.**

(1) *Construction of will—Invalidity of authority purporting to be given to a widow jointly with others to adopt.*—That no one except the widow, authorized for the purpose by her husband, can adopt a son to him after his decease is a principle in the Hindu law of adoption. The power is exerciseable by the widow alone, though restriction may be placed upon her choice of a boy by the husband's having made it a condition that persons named by him should concur in the choice. A husband had by his will purported to authorize his widow, whom he made his executrix jointly with two other persons whom he appointed his executors, to adopt a son to him. *Held*, that by this no valid authority to adopt was given to the widow. The conjecture that the testator really meant to give authority to the widow to adopt, restricting her power merely to the extent that there should be others, his executors, who were to consent to the choice of a boy to be adopted by her, could not be accepted as a legitimate construction of the will. The authority was expressed in clear terms to be to the three. It would also be beyond the range of judicial interpretation to construe the will as meaning that the testator only intended to provide for the appointment of a male successor to him in the property. AMRITO LAL DUTT v. SURNOMOYE DASI, 27 C. 996 (P.C.) = 27 I. A. 128 = 4 C.W.N. 549 = 2 Bom. L. R. 446 = 7 Sar. P.C.J. 734 ... 652

(2) Suit for immoveable property on declaration of invalidity of—See LIMITATION ACT (XV OF 1877), 27 C. 242.

(3) See HINDU LAW (CUSTOM), 27 C. 379.

(4) See LIMITATION ACT (XV OF 1877), 27 C. 242.

———**2.—Alienation.**

See HINDU LAW (JOINT FAMILY), 27 C. 762.

———**3.—Custom.**

Jains—Power of sonless widow to adopt a son without permission of husband—Saraogis—Right of a sonless Jain widow—Limitation Act (IX *of* 1871), *art.* 129—*Minority.*—Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different; and oral evidence of the same kind is equally admissible. There is nothing to limit the scope of the inquiry to the particular locality in which the persons setting up the custom reside. Upon the evidence in the case, consisting partly of judicial decisions and partly of oral testimony, it was *held* that the custom that a sonless Jain widow was competent to adopt a son to her husband without his permission or the consent of the kinsmen, was sufficiently established, and that in this respect there was no material difference in

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the custom of the Agarwalla, Choreewal, Khandwal and Oswal sects of the Jains; and that there was nothing to differentiate the Jains at Arrah from the Jains elsewhere. *Held*, also, that the terms *Jain* and *Saraogi* are synonymous. A childless Jain widow acquires an absolute right in her husband's separate property. An adoption was made by *M*, a Hindu widow to her husband *J* in 1854, when the plaintiff's father, the then nearest reversionary heir to *J*, was alive; and the adopted son *B* got actual possession of the property left by *J*, on the 14th April 1877, under a deed of gift executed by *M*. *M* died on the 6th February 1883; and *B* was succeeded by his son, the present defendant. The plaintiff's father died on the 15th October 1875, and the plaintiff attained his majority on the 28th July 1894, having been born on the 29th July 1873. The plaintiff brought the present suit against the defendant, on the 28th January 1895, for the recovery of the properties left by *J* as being his nearest reversionary heir. *Held*, that the suit was barred under art. 129 of the Limitation Act IX of 1871, as it involved the setting aside of an adoption made in 1854, having been brought after 12 years from the date of the adoption, and the period of limitation having commenced to run during the lifetime of the plaintiff's father. HARNABH PERSHAD v. MANDIL DASS, 27 C. 379 ... 251

————4.—Debts.

See HINDU LAW (JOINT FAMILY), 27 C. 724, 762.

————5.—Gift.

(1) To widow as "Malikatwa"—See HINDU LAW (WILL), 27 C. 44, 649.

(2) *Validity of—Gift of immoveable property without possession—Mutation of names without objection of donor.*—A gift of immoveable property, followed shortly afterwards (pursuant to the terms of the gift) by mutation of names without any objection being made by the donor, was not invalid for the mere reason that the donor did not deliver actual possession. RAM CHANDRA MUKERJEE v. RANJIT SINGH, 27 C. 242=4 C.W.N. 405 ... 160

————6.—Impartible Estates.

Assignment of part of—See DECREE, 27 C. 103.

————7.—Joint Family.

(1) *Estate—Succession—Title of member by survivorship—Partition not established by award and record at settlement of widow's estate for life—Central Provinces Land Revenue Act* (XVIII *of* 1881), *s.* 87.—Where a Hindu and his widow had successively held the estate in suit as joint family estate in coparcenary with the appellant or his predecessor: *Held*, that the appellant succeeded at the widow's death. Though the widow was recorded under an award by the Collector in the settlement records as owner of an 8 anna share of the estate for her lifetime, that did not operate as a separation in title or alter its devolution. Section 87 of the Land Revenue Act, Central Provinces (XVIII of 1881), did not affect the appellant's claim, for the award related solely to the widow's interest. REWA PRASAD SUKAL v. DEO DUTT RAM SUKAL, 27 C. 516 (P.C.)=27 I.A. 39=2 Bom. L.R. 558 =7 Sar. P.C.J. 653 ... 338

(2) Maintenance of member of junior branch of Hindu family—See DECREE, 27 C. 103.

(3) *Mitakshara family—Alienation of ancestral property by father—Liability of sons for father's debts—Mortgage—Suit by mortgagee against son for sale of ancestral property—Antecedent debt—Legal necessity—Illegal or immoral purpose—Money-decree—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 116.—In the case of a joint Mitakshara family where the father raised money on a mortgage hypothecating certain ancestral family property, and it was not proved that the money was required for payment of any antecedent debt or that the money was raised or expended for illegal or immoral purposes, or that any inquiry was made on behalf of the mortgagee as to the purpose for which the debt was incurred. *Held*, that the mortgage security could not be enforced against the son (the father having died), unless it could be shown that the debts for which the mortgage was created were antecedent to the transaction in question. Under the above circumstances the mortgage is not binding on the son; but the debt not being proved to have been incurred for immoral or illegal purposes, the

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mortgagee would be entitled to a money-decree against the defendants, not upon the mortgage security, but upon the simple obligation created by the bond; and a suit for such a relief must, under the Limitation Act, be instituted within six years from the due date of the mortgage bond. SURJA PRASAD v. GOLAB CHAND, 27 C. 762 ... 499

(4) *Mitakshara family—Liability of son to pay father's debt incurred during son's minority—Representative capacity of father—Antecedent debt—Mortgage—Suit for sale on mortgage by father without joining sons — Non-joinder of parties—Transfer of Property Act* (IV *of* 1882), *s.* 85—*Notice of interest in mortgaged property — Multiplicity of suits — Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 28, 42, 436, 437, 575.—In the case of a joint Mitakshara family consisting of a father and a minor son where the father executed a mortgage bond hypothecating ancestral family property during the minority of his son, and the mortgagee with the notice of the interest of the son in the mortgaged property brought a suit against the father alone to enforce the mortgage without making the son a party to the suit and obtained a decree declaring that the mortgaged property was liable to be sold in execution thereof, and where the debt was not proved to have been incurred for illegal or immoral purposes: *Held, per* GHOSE, J.—That the share of the son in the ancestral property was liable for the satisfaction of such decree notwithstanding the provisions of s. 85 of the Transfer of Property Act (IV of 1882), the father having incurred the debt in his representative capacity and as managing member of the family, and the son having been substantially a party to the suit in which the said decree was passed through the representation of his father. Section 85 of the Transfer of Property Act lays down only a rule of procedure; and the words "all persons" in the section could have hardly been intended to include a Mitakshara son—much less a minor son—in a suit where the father is sued in his representative capacity. *Semble*—(*a*) In the case of a joint Mitakshara family consisting of a father and minor sons, the father is "necessarily" the manager of the joint family, and as such, for all purposes, is the representative of the family; (*b*) And where the father, the managing member, mortgages family property for an antecedent debt, and a suit is brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him in his representative capacity; (*c*) And that if a son, after a decree being obtained against the father upon a mortgage executed by the latter sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution thereof sues to recover possession of his share, he cannot succeed unless he proves that the debt was contracted for an immoral or illegal purpose, or that it was of an illusory character. *Per* HARINGTON, J.—Having regard to the provisions of s. 85 of the Transfer of Property Act and those of ss. 28 and 42 of the Civ. Pro. Code, the mortgagee was bound to make the plaintiff (the son) a party to the mortgage suit; and not having done so, he was not entitled to obtain a decree affecting the plaintiff's interest in the mortgaged property. LALA SURJA PRASAD v. GOLAB CHAND, 27 C. 724=4 C.W.N. 701 ... 475

(5) *Partition—Right to an account—Suit for partition referred to arbitration but property not wholly partitioned—Infant's right to an account of his share of the property partitioned and unpartitioned.*—*A*, a member of a Hindu joint family, died leaving a widow and no issue. By his will be appointed *B*, *C* and *D*, members of the joint family, his executors, and gave his widow power to adopt. In pursuance of that power the widow adopted *E*. The executors instituted a suit for partition of the joint estates, and the suit was referred to the arbitration of *Z*. He died without having partitioned the whole of the property, and an application was then made to the Court to determine the partition. The Court granted the application and the suit came on for trial. The infant *E* asked for an account to be taken of the dealings of the joint property, and of the rents and profits on behalf of the estate of his late father, from the death of his father up to the appointment of a Receiver. *Held*, that in respect of the properties remaining unpartitioned the infant was entitled to an account of the dealings of the joint-property, and of the rents and profits from the death of his father up to the time a Receiver was appointed, but as to the properties already partitioned, he was not so entitled. SARAT CHUNDER SINGH v. NITYE SUNDER SINGH, 27 C. 1013 ... 664

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(1) Allowance for—See ATTACHMENT, 27 C. 38.

(2) Decree declaring charge on immoveable property for—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 194.

(3) Grant by Zamindar for—See GRANT, 27 C. 156.

(4) Of member of junior branch of—See DECREE, 27 C. 103.

(5) *Widow's right to a share in lieu of maintenance on a partition—Right of a purchaser from one of the sons.*—A Hindu mother is entitled under the law to be maintained out of the joint family property, and if anything is done affecting that right, as for instance by the sale of any particular share by any of her sons, her right comes into existence. A purchaser from one of the sons has the same rights and takes it subject to the same liabilities as those of the person from whom he purchased. AMRITA LAL MITTER v. MANICK LAL MULLICK, 27 C. 551 = 4 C.W.N. 764 ... 362

(6) *Widow's right to a share in lieu of maintenance, on a partition suit having been instituted—Transfer of Property Act (IV of 1882), s. 52—Lis pendens.*—After the institution of a partition suit by a member of a joint Hindu family consisting of six brothers and a mother, but before the summonses were served, one of the sons (defendant No. 1) transferred his share of the property, alleging it to be one-sixth, to a third party, who was subsequently added as a party defendant to the suit. At the time of the transfer both the transferor and the transferee had notice of the said suit. On a question having been raised as to what share of the property the transferee was entitled to: *Held*, that inasmuch as the suit for partition was instituted by one of the sons, the mother had an inchoate or quasi-contingent right, which ripened into an absolute right on a partition having taken place (which happened in this case), and therefore she having been entitled to a share, the transferee could not get more than what the transferor was entitled to at the time of the transfer, *i.e.*, one-seventh share of the property. *Held*, also, that inasmuch as both the transferee and the transferor had notice of the partition suit at the time of the transfer, and as there was a dispute about the shares, s. 52 of the Transfer of Property Act applied to the case. JOGENDRA CHUNDER GHOSE v. FULKUMARI DASSI, 27 C. 77 = 4 C.W.N. 254 ... 51

(7) See JURISDICTION, 27 C. 555.

———**9.—*Marriage.***

Evidence of marriage—Inference and probabilities weighed against direct testimony.—Upon a widow's claim for maintenance the question was whether the relation between her and a person, deceased many years before her suit, whom she alleged to have been her husband, had been the relation of marriage or of concubinage. The decision of this question, one way or the other, rested on considerations whether the substantial testimony of witnesses, who gave their testimony to the fact of the marriage in their presence, was, or was not, outweighed and negatived in judicial estimation by the antecedent and inherent improbability that such a marriage, under the circumstances of the parties alleged to have entered into it, would have taken place. The oral evidence was, however, corroborated by inferences drawn from several facts well established. The present suit was defended by the successor in estate of the deceased, and it was common ground between this defendant and the plaintiff that there had been cohabitation between the deceased and the latter. This narrowed the effect of the condition and circumstances of the deceased at the time of the alleged marriage upon the question whether it was a fact. The ordinary criteria afforded by conduct contributed but little aid to remove doubt. In the result, the conclusion of the Judicial Committee was that the direct oral testimony had not been overborne, but should prevail against the improbability presented by the case that such a marriage should have taken place. The affirmative of it was maintained, and the widow's claim allowed. LUCHMI KOER v. ROGHU NATH DASS, 27 C. 971 (P.C.) = 27 I.A. 142 = 4 C.W.N. 685 = 7 Sar. P.C.J. 734 ... 635

———**10.—*Minority.***

(1) Minor—Right of, to an account—See HINDU LAW (JOINT FAMILY), 27 C. 1013.

(2) See HINDU LAW (CUSTOM), 27 C. 379.

Hindu Law—11.—Partition. PAGE

(1) Hindu widow's right to share on—See HINDU LAW (MAINTENANCE), 27 C. 77.

(2) See HINDU LAW (JOINT FAMILY), 27 C. 515, 1013.

(3) See HINDU LAW (MAINTENANCE), 27 C. 551.

———12.—Succession.

See ACT I OF 1869 (OUDH ESTATES), 27 C. 344.

———13.—Widow.

(1) Gift to, as "malikatwa"—See HINDU LAW (WILL), 27 C. 44, 649.

(2) Right to share in lieu of maintenance—See HINDU LAW (MAINTENANCE), 27 C. 77.

(3) See HINDU LAW (CUSTOM), 27 C. 379.

(4) See HINDU LAW (JOINT FAMILY), 27 C. 515.

(5) See HINDU LAW (MAINTENANCE), 27 C. 551.

(6) See JURISDICTION, 27 C. 555.

———14.—Will.

(1) *Acknowledgment of signature by testator—Attestation—Witness—Succession Act* (X *of* 1865), *s.* 50.—The signature of a testator at the commencement of his will, when the witnesses attested it, and his admission to the attesting witnesses that the paper which they attest is his last will, constitute sufficient acknowledgment of his signature to his will, even though the witnesses do not see him sign it, or observe any signature to the paper which they attest. The registration of his will by a testator and his signature to the certificate of admission of execution, testified by the signatures of the Sub-Registrar, and of a witness is sufficient attestation to satisfy the requirements of s. 50 of Act X of 1865. AMARENDRA NATH CHATTERJEE v. KASHI NATH CHATTERJEE, 27 C. 169 ... 111

(2) Construction of—See HINDU LAW (ADOPTION), 27 C. 996.

(3) *Construction of will—Dayabhagha family—Disposition to widow as* malikatwa.—*K*, a Hindu, died without issue, leaving him surviving a widow *B*, and having made and published his will wherein he stated, "I appoint my wife *B* to the *malikatwa* after my demise as exercised by myself in respect of the family dwelling house . . . . wearing apparel, utensils, &c., whatever there is in respect of all the property aforesaid." *B* upon the death of *K* took possession of his properties. Upon *B's* death the plaintiffs, who claimed to be *K's* nearest of kin, brought this suit contending that the words of the will only conveyed a life estate to his widow *B*, and that after her death they were entitled to *K's* properties. The defendant, who claimed to be *B's* nearest of kin, contended that the words of the will gave *B* an absolute estate in *K's* properties, and that he was entitled to the whole estate. *Held* that the intention of the testater was to give his widow B an absolute heritable and alienable estate in his properties. RAJNARAIN BHADOORY v. ASHUTOSH CHUCKERBUTTY, 27 C. 44 ... 30

(4) *Construction of will—Dayabhaga family—Disposition to widow as* malikatwa. —*K*, a Hindu, died without issue leaving him surviving a widow *B*, having made a will in the following terms:—" I, having by reason of ill-health come to the house of my father-in-law *N*, and not having recovered under various modes of medical treatment, (and hence) considering my life in peril I "appoint" (literally " make ") "my wife *B*. to the *malikatwa* (ownership) after my demise as exercised " (literally " done ") " by myself in respect of the family dwelling house (describing it) and wearing apparel, utensils, &c., whatever there is (*i.e.*) in respect of all the properties aforesaid I of my own free will make this will."

Held, that *B* took an absolute heritable and alienable interest. RAJNARAIN BHADURI v. S. M. KATYANI DABEE, 27 C. 649=4 C.W.N. 337 ... 425

(5) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 27 C. 683.

(6) See PROBATE, 27 C. 521, 927.

Illegal Gratification.

Offence of giving—See PENAL CODE (ACT XLV OF 1860), 27 C. 144.

Immoveable Property. PAGE

(1) Decree declaring charge on, for maintenance—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 194.

(2) Gift of, without possession—See HINDU LAW (GIFT), 27 C. 242.

(3) Suit for, on declaration of invalidity of adoption—See LIMITATION ACT (XV OF 1877), 27 C. 242.

Income-tax.

See ACT II OF 1886 (INCOME-TAX), 27 C. 674.

Infant.

Right to an account—See HINDU LAW (JOINT FAMILY), 27 C. 1013.

Inference.

And probabilities against direct testimony—See HINDU LAW (MARRIAGE), 27 C. 971.

Insolvency.

(1) Incomplete—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 217.

(2) *Vesting order—Civ. Pro. Code, (Act* XIV *of* 1882), *s.* 295—*Rights created by s.* 295 *not affected by insolvency—Insolvent Act* (11 *&* 12 *Vict., Chap.* 21), *s.* 49.—An order under s. 295 of the Civ. Pro. Code affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency, but as regards sums accrued due prior to the date of the insolvency the order under s. 295 creates rights, which are not affected by the insolvency. HOWATSON v. DURRANT, 27 C. 351=4 C.W.N. 610 ... 232

Insolvent Act 11 and 12 Vict, c. 21.

(1) S. 7—See CIV. PRO. CODE, (ACT XIV OF 1882), 27 C. 217.

(2) S. 49—See INSOLVENCY, 27 C. 351.

Insurance.

Life Assurance—Truth of answers to queries of Life Insurance Company—Warranty—Declaration by Assured to Medical Examiner of Company—Admissibility of evidence to show declarations not made by Assured—Verbal representation to Medical Examiner, effect of.—*G* applied to defendant-company in Calcutta to insure his life for the sum of Rs. 10,500 to be secured by five different policies. The policies were duly executed by the Company and delivered to the plaintiff, the wife of *G*, on his behalf. The Company's printed form of application for insurance and the printed form of declarations of the Medical Examiner of the Company were signed by *G*. The agreement of *G* with the Company was that the statements and representations contained in his application, together with those made to the Medical Examiner by him, should be the basis of the contract between him and the Company. He warranted them to be full, complete, and true, whether written by his own hand or not, and that the warranty was to be a condition precedent to, and a consideration for, the policy, which might be issued thereon; and he further agreed that no statements, representations or information made or given by or to any person soliciting or taking the application for the policy, or by or to any other person, should be binding on the Company, or in any way affect its rights, unless such statements, representations or information be reduced to writing, and presented to the officers of the said Company at their Home Office in the city of New York on the application. On *G*'s death the plaintiff sued the Company for the amounts due under the policies. The plaintiff admitted that certain statements and representations made by *G*, both in his application and declaration to the Medical Examiner, were untrue, but urged that it was open to her to show (1) that *G* signed the declaration to the Medical Examiner before it was filled up, and in consequence was not responsible for the contents of that declaration; (2) that *G* showed to the Medical Examiner a certain statement drawn up by *G* of an illness he had suffered from for three years, and that the knowledge thus acquired by the Medical Examiner must be imputed to the Company. *Held*, reversing the decision of the Court below, that the plaintiff was bound by the terms of the contract between *G* and the Company; that it was not open to the plaintiff to show that *G* did not state what, under his own signature he declared

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to be true, and yet to hold the Company liable on the policy, brushing aside and treating as of no import whatever the statements and representations which formed the basis of the contract; and that the misstatement and misrepresentations made by *G* were amply sufficient to warrant the Company in avoiding the policy. NEW YORK LIFE INSURANCE COMPANY v. GAMBLE, 27 C. 593. ... 390

Interest.

(1) Covenants as to payment of—See MORTGAGE (GENERAL), 27 C. 938.

(2) *Mortgage bond—Failure to pay on due date—Stipulation for the payment of enhanced interest from date of default till date of realization—Whether such stipulation is a penalty where a sum is mentioned in the contract as the amount to be paid in case of a breach of the contract—Contract Act* (IX *of* 1872), *s.* 74.—In a mortgage bond where the parties were adults, the provision as to interest was to the following effect: "On account of interest of the said sum of money, you shall take the profits of the said lands, and I will pay Rs. 20 per annum as the balance of interest from year to year by getting the said amount endorsed on the back of this document, and if I fail to do so, then at the end of the year the said amount of interest shall be added to the principal; and for the total amount whatever it will be I will pay up to the date of repayment at the rate of ½ anna per rupee per mensem." *Held*, that inasmuch as what was specified in the contract was only the enhanced rate of interest, but no definite amount was specified as being payable in the event of a breach, nor could it be said that the amount, though not expressly stated in definite terms, was an ascertainable and definite amount which could become payable at the date of the breach, the stipulation for the payment of enhanced interest did not come within the scope of s. 74 of the Contract Act. DENO NATH SANTH v. NIBARAN CHANDER CHUCKERBUTTY, 27 C. 421=4 C.W.N. 122 ... 278

(3) Of purchase-money—See SALE, 27 C. 308.

(4) See HINDU LAW (JOINT FAMILY), 27 C. 724.

(5) See LIMITATION, 27 C. 814.

(6) See MESNE PROFITS, 27 C. 951.

Irregularity.

(1) In order—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 981.

(2) Not affecting merits of case—See ARBITRATION, 27 C. 61.

Jains.

See HINDU LAW (CUSTOM), 27 C. 379.

Joinder.

(1) See CHARGES, 27 C. 839.

(2) See PARTIES, 27 C. 493.

Joint Judgment-debtors.

Application for execution of decree against—See LIMITATION ACT (XV OF 1877), 27 C. 210.

Joint Landlords.

See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 417, 479.

Joint Owners.

Governed by Mitakshara law—see CRIM. PRO. CODE (ACT V OF 1898), 27 C. 259.

Joint Trial.

See SECURITY FOR GOOD BEHAVIOUR, 27 C. 781.

Judgment.

Inter partes—See FRAUD, 27 C. 11.

Judgment-debtor.

Not party to execution proceeding—See LIMITATION ACT (XV OF 1877), 27 C. 210.

Judicial Officer.

See FALSE EVIDENCE, 27 C. 820.

Judicial Proceeding.

See EVIDENCE ACT (I OF 1872), 27 C. 639.

Jurisdiction.

(1) *Bengal, N. W. P. and Assam Civil Courts Act* (XII *of* 1887), *s.* 13, *cl.* 2—*Transfer of Property Act* (IV *of* 1882), *ss.* 88, 90—*Sale in execution of mortgage decree—Execution of decree.*—When Subordinate Judges are appointed by the Local Government with jurisdiction over the whole of a district, the District Judge is not competent, under s. 13 (2) of the Bengal, N. W. P., and Assam Civil Courts Act, to assign to them different areas *so as to limit or define their respective jurisdictions.* The Court of such a Subordinate Judge which passed a mortgage decree is therefore the only Court competent to entertain an application for the execution of the decree and to make an order in furtherance thereof, even when the execution is sought by the sale of property other than the mortgaged property, lying within the district, but outside the area assigned to it by the District Judge. BACHU KOER v. GOLAB CHAND, 27 C. 272 ... 180

(2) *Cause of action—Suit for maintenance—Letters Patent*, 1865, *cl.* 12—*Right of maintenance of a sonless widowed daughter in indigent circumstances out of properties inherited by the father's heirs.*—The plaintiff's father left various properties partly within and partly outside Calcutta. The plaintiff instituted this suit, as an indigent sonless widowed daughter, against the defendants for the recovery of her maintenance out of the estate inherited by them from her father, and prayed that her maintenance might be declared a charge upon the property situated within the limits of Calcutta. Some of the defendants lived within and some outside Calcutta. Leave was obtained under cl. 12 of the Letters Patent. It was held that under the abovementioned circumstances the High Court had jurisdiction to try the action. A sonless widowed daughter in indigent circumstances is not entitled to separate maintenance out of the estate of her father in the hands of his heirs. The right would depend upon the fact, whether the widowed sonless daughter was at the time of her father's death maintained by him as a dependent member of his family with others whom he was legally or morally bound to maintain. The position of a sonless widowed daughter is not the same as that of a disqualified owner or disqualified heir. MOKHADA DASSEE v. NANDO LALL HALDAR, 27 C. 555=4 C.W.N. 669 ... 365

(3) Irregularity not affecting—See ARBITRATION, 27 C. 61.

(4) *Of Civil Court—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 107 *and* 108—*Landlord and tenant—Record of rights—Decision of a Revenue Officer.*—An order made by a Revenue Officer under s. 107 of the Bengal Tenancy Act, determining the rent payable for a holding, has the force of a decree, and, when not set aside by appeal or otherwise, cannot be questioned in a Civil Court. RAM AUTAR SINGH v. SANOMAN SINGH, 27 C. 167 ... 110

(5) Person not residing within—See SECURITY FOR GOOD BEHAVIOUR, 27 C. 993.

(6) See ACT III OF 1884 (BENGAL MUNICIPAL), 27 C. 849.

(7) See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 364.

(8) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 488.

(9) See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 892, 918.

(10) See HIGH COURT, 27 C. 654.

(11) See RIGHT OF SUIT, 27 C. 793.

Kidnapping.

Kidnapping from lawful guardianship—Completion of such offence—Whether a continuous offence—Constructive possession—Penal Code, Act (XLV *of* 1860), *ss.* 360, 361 *and* 363.—*J*, a minor girl, was taken away from her husband's house to the house of *R*, and there kept for two days. Then one *M* came and took her away to his own house and kept her there for twenty days, and subsequently clandestinely removed her to the house of the petitioner, and from that house the petitioner and *M* took her through different places

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to Calcutta. The petitioner was convicted under s. 363 of the Penal Code for kidnapping a girl under 16 years of age from the lawful guardianship of her husband. *Held* (by the majority of the Full Bench) that the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offenders in taking the girl to Calcutta, and that the petitioner, therefore, could not be convicted under s. 363 of the Penal Code. *Held*, further that the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship; it is not an offence continuing so long as she is kept out of such guardianship. *Per* RAMPINI, J.—The offence of kidnapping under s. 363 is not necessarily or in all cases complete as soon as the minor is removed from the house of the guardian; when the act of kidnapping is complete is a question of fact to be determined according to the circumstances of each case. NEMAI CHATTORAJ v. QUEEN-EMPRESS, 27 C. 1041 (F.B.) = 4 C.W.N. 645 ... 682

Land.

(1) Character and mode of enjoyment of—See LIMITATION, 27 C. 25.

(2) Deficiency in area of—See SALE, 27 C. 264.

(3) Not proved to be let for Agricultural or Horticultural purposes—See LANDLORD AND TENANT, 27 C. 205.

(4) Outside limits of Town of Calcutta, but within its Municipal boundaries—See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 202.

Land Acquisition Act (I of 1894).

(1) Ss. 9, 10—See COMPLAINT, 27 C. 985.

(2) S. 53—See FALSE EVIDENCE, 27 C. 820.

Landlord and Tenant.

(1) *Ejectment—Notice to quit by post—Bengal Tenancy Act* (VIII *of* 1885), s. 189 —*Mode of service of the notice under the Act—Bengal Government, r.* 3, *chap.* I, *under* s. 189 *of the Bengal Tenancy Act.*—The plaintiffs served a notice by post upon the defendant to quit certain *khud kasht* lands that were alleged to be in his wrongful possession, and subsequently instituted a suit to eject him from those lands: *Held*, that the notice was bad in law and the suit for ejectment based upon such a notice must fail. LALA MAKHAN LAL v. LALA KULDIP NARAIN, 27 C. 774 ... 596

(2) *Lease—Suit for account—Principal and Agent, relationship of—Set off—Rent set off against advances—Suit for rent—Limitation Act* (XV *of* 1877), *arts.* 85, 89, *sch.* II.—The plaintiffs executed a lease for nine years in favour of the defendant No. 1 at a fixed annual rent payable by instalments. The defendant under instructions from the plaintiffs paid from time to time Government revenue, cesses, expenses of litigation, &c., on their behalf, and used to set off those sums against the rent due to them under the lease; no sum of money by way of advance or otherwise from the plaintiffs ever came into the hands of the defendant. After the expiry of the lease the plaintiffs instituted this suit against the defendant for an account: *Held*, that the suit for an account was not maintainable; the relationship between the parties as created by the lease was simply that of landlord and tenant, and the only relief which the plaintiffs could have properly asked for was a decree for rent, if any was still due. BHEKDHARI LAL v. BADHSINGH DUDHARIA, 27 C. 663. ... 436

(3) *Sale of tenure for arrears of rent—Act* X *of* 1859—*Non-attachment and non-publication of sale proclamation—Civ. Pro. Code* (*Act* XIV *of* 1882), s. 311 —*Non-registration of purchase in the landlord's* sherista.—There is no provision in Act X of 1859 under which the sale of a *jote* in execution of a rent decree is liable to be set aside on the ground of non-attachment and non-proof of publication of the sale proclamation. In a case governed by Act X of 1859, it was *held* that a person, who had purchased a transferable *jote*, but who did not get his name registered in the landlord's *sherista* had no *locus standi* against a subsequent auction-purchaser of the *jote* in execution of a decree obtained against the recorded tenant, and had no right to impugn the title of the auction-purchaser under the sale. PATIT SHAHU v. HARI MAHANTI, 27 C. 789 = 5 C.W.N. 126 ... 517

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(4) *Suit by a landlord against tenant for a certain sum payable by him out of the rent to a third person by assignment—Whether such a suit is one for rent or for damages.—Held,* (by the Full Bench) that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment, is one for rent and not for damages. BASANTA KUMARI DEBYA v. ASHUTOSH CHUCKERBUTTY, 27 C. 67 (**F.B.**)=4 C.W.N. 3 ... 45

(5) *Suit for ejectment—Notice to quit—Tenancy created by a* kabuliyat—*Six months' notice requiring the tenant to vacate the holding before the expiry of the last day of the year, whether good—Presumption as to a tenancy being a permament one—Long possession, transfers of the holding, and erection of* pucca *building, whether sufficient for a presumption that the tenancy is a permanent one—Compensation on ejectment—Transfer of Property Act* (IV *of* 1882), *ss.* 51 *and* 108, *cl.* (*h*).—In a tenancy created by a *kabuliyat* with an annual rent reserved, a six months' notice to quit requiring the tenant to vacate the holding within, instead of on, the expiry of the last day of a year of the tenancy, is a good notice in law, inasmuch as there was no appreciable interval between the expiry of the notice and the end of a year of the tenancy. *Page* v. *More*, 15 Q. B. 684 distinguished. Where a tenancy was created by a *kabuliyat*, which on the face of it contained nothing to imply permanency in the tenure created, which contained no words of inheritance, nor anything to show that the land was taken for residential or building purposes; that though the land passed by successive transfers, there was nothing to show that the landlord had knowledge of them or registered the transferees as tenants; that though there were *pucca* buildings on the land, they had not been in existence for such a length of time as would warrant an inference that the lease was one for building purposes; that there was nothing to show that they were erected under circumstances from which acquiescence of the landlord and the creation of an equitable right in the tenant could be inferred; or that they were erected with the knowledge of the landlord; these facts are not sufficient to warrant an inference that the tenancy was, when first created, intended to be permanent, or was subsequently by implied agreement converted into a permanent one. To resist ejectment by a tenant on the ground that the tenancy is a permanent one, and that the landlord stood by and permitted him (the tenant) to erect *pucca* buildings on the land in the belief that the said tenancy was a permanent one, it is incumbent on the tenant to show that in erecting the buildings he was acting under an honest belief that he had a permanent right in the land, and the landlord knowing that he (the tenant) was acting under such belief stood by and allowed him to go on with the construction of the buildings. Where it is proved that the tenancy is not a permanent one, that the tenant erected a *pucca* building on the land without the consent of the landlord, the tenant on eviction is not entitled to any compensation for the building from the landlord. ISMAIL KHAN MAHOMED v. JAIGUN BIBI, 27 C. 570=4 C.W.N. 210 ... 374

(6) *Suit for rent against a person holding land within a municipality and the land not proved to have been let out for agricultural or horticultural purposes Bengal Tenancy Act* (VIII *of* 1885), *s.* 5, *sub-s.* 1; *s.* 7, *sub-s.* 3 *and sch,* III—*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 116—*Tenure-holder—Transfer of Property Act* (IV *of* 1882), *chap.* V, *s.* 117.—The mere fact that a person has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent, is not sufficient to prove that he is a tenure-holder within the meaning of the Bengal Tenancy Act. It must be proved that the land was let out as a holding for agricultural or horticultural purposes. In a suit for rent for a period of six years by an *ijaradar* upon the basis of a *kabuliat* alleged to have been executed by the predecessor of the defendant, it was contended for the first time before the appellate Court that the suit was barred by limitation, being one for rent for a period of more than three years. It was found that the land was not let out for agricultural or horticultural purposes. *Held*, that inasmuch as the land was not let out for agricultural or horticultural purposes, the Bengal Tenancy did not apply, and therefore the suit was not barred by limitation. UMRAO BIBI v. MAHOMED ROJABI, **27 C. 205=4 C.W.N. 76** ... 136

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(7) See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), 27 C. 178.
(8) See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 417, 479, 545.
(9) See APPEAL (SECOND APPEAL), 27 C. 508.
(10) See JURISDICTION, 27 C. 167.

Land Tenure.

See SALE, 27 C. 407.

Lease.

(1) By grantee in excess of his estate—See GRANT, 27 C. 156.
(2) See LANDLORD AND TENANT, 27 C. 663.

Legal Proof.

Of misconduct—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS'), 27 C. 1023.

Legal Representative.

(1) Of registered proprietor—ACT VII OF 1876 (LAND REGISTRATION, BENGAL), 27 C. 178.
(2) See APPEAL (GENERAL), 27 C. 670.

Lender.

See ACCOMPLICE, 27 C. 925.

Letters of Administration.

Re-opening of proceedings for—See PROBATE, 27 C. 927.

Letters Patent, 1865 (High Court).

(1) Cl. 12—See JURISDICTION, 27 C. 555.
(2) Cl. 28—See REVISION, 27 C. 126.

Life Assurance.

See INSURANCE, 27 C. 593.

Limitation.

(1) *Bengal Tenancy Act* (VIII *of* 1885), *sch.*III, *art.*3—*Limitation Act* (XV *of* 1877), *s.* 22—*Civ. Pro. Code* (XIV *of* 1882), *s.*32—*Parties—Adding parties to suit—Adding party by a Court of its own motion.*—No question of limitation arises, and s. 22 of the Indian Limitation Act does not apply, when the Court of its own motion acts under s. 32 of the Code of Civil Procedure, and orders that the name of any person be added as a defendant. FAKERA PASBAN v. BIBI AZIMUNNISSA, 27 C. 540=4 C.W.N. 459 ... 355

(2) *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 230—*Decree for sale of mortgaged property, making the defendant personally liable in case of insufficiency—Mortgage decree—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 179, cl. 4—*Step in aid of execution—Application for time—Application to review the order striking off the execution case and to restore it to file.*—A decree which directs the realisation of the decretal amount by sale, in the first instance, of the mortgaged properties, and afterwards from the persons and other properties of the defendants, is a mortgage decree and not "a decree for the payment of money within the meaning of s. 230 of the Civ. Pro. Code. Application for time is not "a step in aid of execution;" but an application for review of an order striking off an execution case and for its restoration to the file is undoubtedly a step in aid of execution within the meaning of the Limitation Act (XV of 1877), sch. II, art. 179. KARTICK NATH PANDEY v. JUGGERNATH RAM MARWARI, 27 C. 285 ... 118

(3) *Plaint presented within time—Plaint insufficiently stamped—Order to supply the deficiency not complied with within the time allowed—Registration of plaint—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 54—*Limitation Act* (XV *of* 1877), *s.* 4.—A plaint was filed one day before the expiry of the period of limitation, but the Court-fees were deficient, and the plaintiff was ordered to pay the deficient Court-fees within a week. This order was complied with one day after the expiry of the time allowed, and the plaint was registered. *Held*, that the suit was barred by limitation, as the deficient court-fees were not supplied within the appointed time, and that the fact

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of the plaint being registered does not prevent its rejection under s. 54 of the Civ. Pro. Code, the terms of which are imperative and mandatory. BRAHMOMOYI DASI v. ANDI SI, 27 C. 376 ... 249

(4) *Possession and actual user—Conflicting evidence of possession—Presumption of possession from title—Title and possession*—Onus probandi—*Character of land in dispute—Mode of enjoyment.*—It is only when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail. The principle does not apply where the evidence of possession is equally unworthy of reliance on both sides. Possession, however, is not necessarily the same as actual user. When therefore the plaintiff has to prove possession of land in dispute within the statutory period of limitation, if there is anything special in the character of the land, for example, when it is permanently or temporarily incapable of actual enjoyment in any one of the customary modes, a presumption in favour of continuance of possession, though in no sense a conclusive one, may arise. THAKUR SING v. BHOGERAJ SINGH, 27 C. 25 ... 17

(5) *Presentation of a plaint, insufficiently stamped—Plaint not rejected, but the Court ordered to put in the deficit Court-fee within a certain time—Effect of such an order—Court Fees Act* (VII *of* 1870), *s.* 28—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 54—*Interest Act* (XXXII *of* 1839)—*Whether a Court is to allow interest from the date of the debt where there is no contract to pay, and no demand made for payment of interest.*—*Held*, that where a plaint was presented in the proper Court with insufficient stamp, and the Court without rejecting it (the plaint), allowed a certain time to put in the deficit Court-fee which was done within the time allowed, for the purposes of limitation the suit should be considered to have been instituted on the date when the plaint was first presented. *Held* also, that in a suit for money lent without any written instrument, where it was found that there was no express contract to pay interest, but it was not found that any demand of payment was made in writing, and that there was any demand giving notice to the debtor that interest would be claimed from the date of the demand, in such a case the creditor was not entitled to any interest before suit. SURENDRA KUMAR BASU v. KUNJA BEHARY SINGH, 27 C. 814=4 C.W.N. 818 ... 533

(6) See BURDEN OF PROOF, 27 C. 221.

(7) See MORTGAGE (BY CONDITIONAL SALE), 27 C. 185.

(8) See TITLE, 27 C. 943.

Limitation Act (XIV of 1859).

S. 1, *cl.* 15—*Act* IX *of* 1871, *s.* 29, *and art.* 148—*Usufructuary mortgage—Limitation of suit — Extinction of mortgagor's title — New starting point by acknowledgment.*—The representatives in estate of a mortgagor, who executed a usufructuary mortgage, dated 17th October 1788, sued the heirs of the mortgagee in 1893, alleging payment of the mortgage in 1881, and claiming the possession of the mortgaged property or other relief. The suit, in the absence of acknowledgment made within sixty years satisfying the requirements of the law of limitation for extension of that period, was barred on the 17th October 1848, by the effect of Act XIV of 1859, s. 1, cl. 15, which barred the suit after the 1st January 1862. Afterwards, by the effect of Act IX of 1871, s. 29, the right of property in the mortgagor was extinguished. In none of the documentary evidence adduced by the plaintiffs was there shown to have been made during the sixty years from the date of the mortgage onwards, any written acknowledgment, satisfying the requirements of the above cl. 15, and thereby giving ground for computing limitation from the date of such acknowledgment. Nor did the fact that a lease was made on the 8th January 1872 of some of the mortgaged property by one of the then mortgagees to one of the mortgagors, the lessor describing himself as usufructuary mortgagee, preclude the defendants from asserting their true title. The description neither estopped the alleged mortgagee from denying that he was in that character at the time of this suit, nor was it a representation which required that he should make it good. It was no essential part of a contract between these parties, and it did not affect the issue now raised. FATIMATULNISSA BEGUM v. SUNDAR DAS, 27 C. 1004 (P.C.)=27 I.A. 103=4 C.W.N. 565=7 Sar. P.C.J. 718 ... 657

Limitation Act (IX of 1871). PAGE

(1) S. 29—See LIMITATION ACT (XIV OF 1859), 27 C. 1004.

(2) Art. 129—See HINDU LAW (CUSTOM), 27 C. 379.

Limitation Act (XV of 1877).

(1) S. 4—See LIMITATION, 27 C. 376.

(2) S. 22—See LIMITATION, 27 C. 540.

(3) *Sch.* II, *art.* 11—*Suit for possession of immoveable property on a declaration that a certain adoption was invalid—Effect of claim preferred on behalf of a minor by the manager without the sanction of the Court of Wards—Court of Wards Act* (*Bengal Act* IX *of* 1879), *s.* 55.—An order which was passed during his minority is not binding upon a person whose estate is under the management of the Court of Wards, if the proceeding in which it was passed was not instituted by the manager with the sanction of the Court of Wards, *i.e.*, of the Commissioner to whom the Court of Wards delegated its authority to grant such sanction. In a suit brought by the plaintiff, as *shebait* of an idol, for recovery of possession of certain immoveable properties, or in the alternative in his own right as an heir to the last full owner, on a declaration that certain execution proceedings which were taken against a person who was not the legally adopted son of the last full owner, and therefore the sales held therein, were not binding upon him, the defence (*inter alia*) was that the suit was barred by limitation under arts. 11 and 118, sch. II of the Limitation Act. *Held*, that inasmuch as the order under s. 281 of the Civ. Pro. Code, was passed during the plaintiff's minority, and as the proceeding in which the said order was passed was not instituted by the manager with the sanction of the Court of Wards the suit was not barred under art. 11, sch. II of the Limitation Act, although it was brought more than one year after the claim was rejected. RAM CHANDRA MUKERJEE v. RANJIT SINGH, 27 C. 242=4 C.W.N. 405 ... 160

(4) Arts. 11, 15—See CLAIM, 27 C. 714.

(5) Art. 62—See LIMITATION ACT (XV OF 1877), 27 C. 180.

(6) Arts. 85, 89—See LANDLORD AND TENANT, 27 C. 663.

(7) Art. 91—See GRANT, 27 C. 156.

(8) Art. 97—See LIMITATION ACT (XV OF 1877), 27 C. 180.

(9) Art. 116—See HINDU LAW (JOINT FAMILY), 27 C. 762.

(10) Sch. II, art. 116—See LANDLORD AND TENANT, 27 C. 205.

(11) *Art.* 118—*Suit for possession of immoveable property on a declaration that an adoption is invalid.*—Art. 118, sch. II, of the Limitation Act does not apply to a suit for possession of immoveable property, though it may be necessary for the plaintiff to prove the invalidity of an adoption. RAM CHANDER MUKERJEE v. RANJIT SINGH, 27 C. 242=4 C.W.N. 405 ... 160

(12) Art. 120—See LIMITATION ACT (XV OF 1877), 27 C. 180.

(13) *Art.* 132—*Sale for arrears of Revenue—Lien of Mortgagee on balance of sale proceeds—Limitation Act, sch.* II, *arts.* 62, 97, 120—*Transfer of Property Act* (IV *of* 1882), *s.* 73—*Mortgage suit—Charge on proceeds of revenue sale—Revenue-paying estate—Act* XI *of* 1859, *s.* 53—When a mortgaged property, being a revenue-paying estate, is sold free from all incumbrances for arrears of revenue, the lien of the mortgagee is transferred from the property itself to the balance of the sale-proceeds which remains after satisfying the Government demand. The time within which a suit can be brought to recover money charged on a mortgaged estate, is not, therefore, shortened by reason of the estate having been sold for arrears of Government revenue; in such a case, a suit brought by the mortgagee for satisfaction of the mortgage-debt out of the surplus sale proceeds, will be governed by art. 132 of the Limitation Act. Even if the original cause of action of the mortgagee, to enforce a charge on the mortgaged property, be considered to cease when the property was sold for arrears of revenue, and if it be considered that a new cause of action then accrued to him so as to entitle him to bring a suit for the recovery of the surplus sale proceeds, art. 120 of the Limitation Act would apply to such a suit. KAMALA KANT SEN v. ABUL BARKAT *alias* HALIBULLA, 27 C. 180 ... 119

(14) Art. 148—See LIMITATION ACT (XIV OF 1859), 27 C. 1004.

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(15) *Art. 179—Step-in-aid of execution—Application for execution of decree against some of the joint judgment-debtors, out of time—Realization of a portion of the decretal amount by such execution, effect of, as against other judgment-debtor who was not a party to the execution proceeding—Application in accordance with law.*—A judgment-debtor, who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation, and that therefore it was not in accordance with law. A decree was obtained against four persons on the 13th August 1890. An application for execution was made against all of them on the 7th October 1893. A subsequent application was made against two of them on the 17th February 1897, and a portion of the decretal amount was realized. On a further application for execution against persons who were parties to the previous execution proceeding and also against a person who was not a party to the said proceeding, objection was taken by the latter that the application for execution as against him was barred by limitation. *Held*, that the application was barred by limitation, inasmuch as the objector was not a party to the previous execution proceeding which was itself barred by limitation, and therefore it had not the effect of keeping the decree alive. HARENDRA LAL ROY CHOWDHRY v. SHAM LAL SEN, 27 C 210 ... 139

(16) Art. 179, cl. (4)—See LIMITATION, 27 C. 285.

(17) *Art. 179, cl. (4)—Step-in-aid of execution—Application by the decree-holder to be put in possession of property which he purchased in execution of his decree.*—An application by a decree-holder to be put in possession of the property which he purchased in execution of his decree is a step in aid of execution of that decree within the meaning of cl. (4), sch. II, art. 179 of the Limitation Act. SARIATOOLLA MOLLA v. RAJ KUMAR ROY, 27 C. 709=4 C.W.N. 681 ... 466

Lis Pendens.

See HINDU LAW (MAINTENANCE), 27 C. 77.

Local Government.

Rule framed by—See ACT VIII OF 1897 (REFORMATORY SCHOOLS), 27 C. 133.

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By amin—See MESNE PROFITS, 27 C. 951.

Magistrate.

(1) Discretion of—See WITNESS, 27 C. 370.

(2) Jurisdiction of—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 259, 892, 918.

(3) See SECURITY FOR GOOD BEHAVIOUR, 27 C. 993.

(4) *Reference of case for trial of offence by Subordinate Court—Power of District Magistrate to issue warrants for arrest of other persons concerned in that offence.*—Where cognizance was taken of an offence on a police report and the case was made over to a Subordinate Magistrate, *held* that, so long as the case connected with that offence remained with the Subordinate Magistrate, no other Magistrate was competent to deal with it, and that applications for warrants against other persons concerned in that offence should be made to the Magistrate before whom the case was and to no other Magistrate. GOLAPDY SHEIK v. QUEEN-EMPRESS, 27 C. 979=4 C.W.N. 827 ... 640

(5) *Power, of to pass orders in cases before subordinate Court without transfer to his own Court—Judicial enquiry before issue of process, legality of—Code of Criminal Procedure, ss.* 192, 202, 203 *and* 204.—*Held*, where the complaints were not made to the District Magistrate nor had the cases based on those complaints been withdrawn to his Court by any order, but were in the Court of a Joint Magistrate, who had examined the complainants, that the District Magistrate was not justified in interposing in the trial of the cases and had no authority under the law to pass any order in those cases. Even if the cases had been removed by the District Magistrate to his own Court for trial, it was very questionable whether the District Magistrate could pass orders directing a judicial inquiry by another Magistrate before the issue of processes so as to postpone the trial. JHUMUCK JHA v. PATHUK MANDAL, 27 C. 798 ... 523

Mahomedan Law. PAGE

1.—LEGITIMACY.
2.—MAINTENANCE.
3.—WAKF.

———**1.—Legitimacy.**

Acknowledgment, effect of—Legitimacy of children—Fornication—Sunnis.—Under the Mahomedan law, where a child is begotten by a Mahomedan father on a Hindu prostitute living with him, no acknowledgment by the father can confer on the child the status of legitimacy. DHAN BIBI v. LALON BIBI, 27 C. 801 ... 525

———**2.—Maintenance.**

See ACT II OF 1886 (INCOME TAX), 27 C. 674.

———**3.—Wakf.**

See ACT II OF 1886 (INCOME TAX), 27 C. 674.

Malice.

See MALICIOUS PROSECUTION, 27 C. 532.

Malicious Prosecution.

Suit for mdamages for alicious prosecution—Malice—Dishonest motive—Effect of bringing a charge of "Assault" for "Criminal Intimidation"—Damages—Reasonable and Probable Cause—Penal Code (Act XLV *of* 1860), *ss.* 351, 352, 503.—Where, in a suit for damages for malicious prosecution on a charge of assault which was dismissed, it appeared from the facts as found by the Lower Courts that there was 'criminal intimidation' on the part of the plaintiff, although he was not charged with that offence by the defendant. *Held*, that the plaintiff would not be entitled to any damages, as no malice or dishonest motive could be imputed to the defendant in bringing the charge of 'assault.' MADHU LAL AHIR GAYAWAL v. SAHI PANDE DHAMI, 27 C. 532 ... 350

Manager.

Claim by, on behalf of minor without sanction of Court of Wards—See LIMITATION ACT (XV OF 1877), 27 C. 242.

Medical Examiner.

See INSURANCE, 27 C. 593.

Mesne Profits.

(1) *Assessment of mesne profits in execution—Civ. Pro. Code (Act* XIV *of* 1882), s. 211—*Local investigation by Amin—Civ. Pro. Code*, ss. 392, 393—*Dakhilas or rent-receipts of tenants—Rents which by ordinary diligence might have been obtained—Interest—Discretion of Court in declining to take evidence after the Report.*—The Court executing a decree for mesne profits commissioned an amin, under s. 392 of the Civ. Pro. Code, to make a local investigation as to them. He was unable to obtain the rent dakhilas of tenants. He inquired as to the prevailing rates of rent for the land which he measured, and included in his estimate of the mesne profits rents which with ordinary diligence might have been obtained. Upon objections taken the questions arose: (1) whether the assessment should have proceeded only upon the rent actually realized, or the amin was right in taking the rent last mentioned into the account; (2) whether the evidence of the rent dakhilas was essential; (3) whether interest, not mentioned in the decree, should have been allowed; (4) whether or not evidence on the application of the objector, should have been taken by the Court after return of the evidence taken in the locality by the amin together with his report. *Held*, as to (1) that inclusion, in the assessment of mesne profits of rents, which at the prevailing rates might have been received by ordinary diligence, was authorised by s. 211 of the Civ. Pro. Code. As to (2), that the dakhilas were important evidence but not essentially necessary. As to (3), that the expression "mesne profits" included, under s. 211, interest on them; but this could only be allowed for not more than three years from the decree, or until possession within that time. As to (4), the question must be decided on general principles in each case. In this instance judicial discretion had been rightly exercised in the Court executing the decree declining to take fresh

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evidence. GRISH CHUNDER LAHIRI v. SOSHI SHIKHARESWAR ROY, 27 C. 951 (P.C.)=27 I.A. 110=4 C.W.N. 631=10 M.L.J. 356=2 Bom. L.R. 709=7 Sar. P.C.J. 687 ... 622

(2) See RIGHT OF SUIT, 27 C. 30.

Minor.

(1) Contract relating to property of—See SPECIFIC PERFORMANCE, 27 C. 276.

(2) Representation of, in suit—See ACT X OF 1873 (OATHS), 27 C. 229.

(3) See PROBATE, 27 C. 350.

Misconduct.

Prior to enrolment as Mukhtar—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 27 C. 1023.

Mitakshara Law.

See HINDU LAW (JOINT FAMILY), 27 C. 724, 762.

Mortgage.

1.—GENERAL.
2.—BY CONDITIONAL SALE.
3.—EXTINCTION.
4.—FORECLOSURE.
5.—LIEN.
6.—REDEMPTION.
7.—USUFRUCTUARY.

———— **1.—General.**

(1) Bond—See INTEREST, 27 C. 421.

(2) *Construction of mortgage—Covenants as to payment of interest—Default in payment of interest.*—A mortgage deed contained covenants for payment at the expiration of a year from its date, with interest to be paid month by month, in the month following that for which it should be due, and to run on from the date of the mortgage at the same rate until the money borrowed and the interest should be paid. It was also covenanted that if before the end of the year the mortgagor should make default in payment of interest during one month after it had become due, in that case the principal and interest should thereupon become claimable. With the latter requirement the mortgagor, failed to comply, not paying the interest within the stated time. *Held* that, on the true construction of the deed, this default having taken place, this suit would lie for both the principal and interest accrued due within the year. YEO HTEAN v. ABU ZAFFER KORESHI, 27 C. 938 (P.C.)=27 I.A. 98=4 C.W.N. 552=7 Sar. P.C.J. 706 ... 61

(3) Decree—See LIMITATION, 27 C. 285.

(4) Decree on, sale in execution of—See JURISDICTION, 27 C. 272.

(5) *Form of mortgage—Definition for purposes of Stamp duty—Assignment by way of mortgage of valuable security to secure pre-existing debt—Stamp duty payable thereon—Stamp Act* (I *of* 1879), *s.* 3, *sub-s.* (13); *s.* 61, *sch.* I, *art* 29, *cl.* (*b*) *and art.* 44.—Art. 29 of sch. I of the Stamp Act (I of 1879) applies to an instrument evidencing an agreement to secure the repayment of a loan, executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. It contemplates an instrument contemporaneous with the advance and with the loan. For the purpose of ascertaining what stamp duty is payable on an instrument alleged to be a mortgage, it is necessary to see if the instrument is a mortgage as defined in the Stamp Act. QUEEN-EMPRESS v. DEBENDRA KRISHNA MITTER, 27 C. 587 =4 C.W.N. 524 ... 385

(6) See ACT VI OF 1876 (CHOTA NAGPORE ENCUMBERED ESTATES), 27 C. 462.

(7) See HINDU LAW (JOINT FAMILY), 27 C. 724, 762.

(8) See LIMITATION ACT (XIV OF 1859), 27 C. 1004.

(9) See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 190, 194.

———— **2.—By Conditional Sale.**

Limitation—Mortgage by conditional sale—Mortgagee in possession—Suit for foreclosure and recovery of possession—Redemption.—A mortgagee by

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conditional sale, who was put into possession of the mortgaged property from the date of the mortgage and who is entitled under the deed to hold possession, is entitled, when wrongfully dispossessed, to recover possession of the property by a suit brought within time, although his claim for foreclosure may be barred by limitation. The possession recovered is, however, possession as mortgagee subject to the mortgagor's right of redemption. AMAN ALLI v. AZGAR ALLI MIA, 27 C. 185 ... 122

——— **3.—Extinction.**

Mortgagor, extinction of title of—See LIMITATION ACT (XIV OF 1859), 27 C. 1004.

——— **4.—Foreclosure.**

(1) And possession, suit for—See MORTGAGE (BY CONDITIONAL SALE), 27 C. 185.

(2) In possession—See MORTGAGE (BY CONDITIONAL SALE), 27 C. 185.

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 705.

——— **5.—Lien.**

Of mortgagee on balance of sale proceeds—See LIMITATION ACT (XV OF 1877), 27 C. 180.

——— **6.—Redemption.**

(1) See MORTGAGE (BY CONDITIONAL SALE), 27 C. 185.

(2) See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 705.

——— **7.—Usufructuary.**

See LIMITATION ACT (XIV OF 1859), 27 C. 1004.

Mukhtar.

(1) Appearance by—See CONTEMPT, 27 C. 985.

(2) Misconduct of—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 27 C. 1023.

Municipal Boundaries.

Of town of Calcutta—See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 202.

Municipal Taxation.

See ACT III OF 1884 (BENGAL MUNICIPAL), 27 C. 849.

Mutation of Names.

Without objection of donor—See HINDU LAW (GIFT), 27 C. 242.

Non-attendance.

On service of summons—See CONTEMPT, 27 C. 985.

Non-joinder.

(1) See HINDU LAW (JOINT FAMILY), 27 C. 724.

(2) See PARTIES, 27 C. 493.

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See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 476.

Notice.

(1) Of charge—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 194.

(2) Of sale, publication of—See SALE, 27 C. 308.

(3) To accused, want of—See CHARGE, 27 C. 660.

(4) To quit—See LANDLORD AND TENANT, 27 C. 570.

(5) To quit, Service of—See LANDLORD AND TENANT, 27 C. 774.

(6) See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 27 C. 693.

(7) See COMPROMISE, 27 C. 428.

(8) See HINDU LAW (JOINT FAMILY), 27 C. 724.

(9) See SECURITY FOR GOOD BEHAVIOUR, 27 C. 656.

(10) See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 358, 468.

Objection.

Taken for first time on appeal—See APPELLATE COURT, 27 C. 205,

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See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 187, 415.

Occupancy Raiyat.

See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 545.

Offence.

(1) Completion of—See KIDNAPPING, 27 C. 1041.

(2) Under Gambling Act—See PENAL CODE (ACT XLV OF 1860), 27 C. 144.

Offerings.

Made to deity, suit for share of—See RIGHT OF SUIT, 27 C. 30.

Official Assignee.

Non-appearance of, dismissal of suit for—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 217.

Order.

(1) For stay of proceedings—See PRIVY COUNCIL, 27 C. 1.

(2) Not properly passed—See ACT VIII OF 1897 (REFORMATORY SCHOOLS), 27 C. 133.

(3) Refusing to amend clerical error in probate—See APPEAL (GENERAL), 27 C. 5.

(4) See APPEAL (GENERAL), 27 C. 414.

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For appeal, filing of—See PRACTICE, 27 C. 57, 60-N.

Pardon.

Crim. Pro. Code (V of 1898), ss. 337 and 339—Tender of pardon—Trial of person who having accepted a pardon has not fulfilled the conditions on which it was offered—Prosecution for giving false evidence—Sanction of High Court.—When a pardon under s. 337 of the Crim. Pro. Code has been tendered to and accepted by any person in connection with an offence he should not be tried for any alleged breach of the conditions of his pardon, or for any offence connected with that for which he has received pardon, until the trial of the principal offence has been completed. No prosecution for the offence of giving false evidence in respect of a statement made by a person who has accepted a tender of pardon should be entertained without the sanction of the High Court as provided by s. 339, cl. (3) of the Code. QUEEN-EMPRESS v. NATU, 27 C. 137 ... 90

Parties.

(1) *Joinder of parties—Dismissal of suit for non-joinder of parties—Necessary party—Civ. Pro. Code (Act XIV of 1882), ss. 28, 32, 295 and 315—English Judicature Act, 1875, O. XVI, rr. 11 and 48.*—On a suit brought by the plaintiff for the establishment of his right to and confirmation of possession to certain immoveable property, and for a declaration that it was not liable to attachment and sale in execution of certain decrees held by defendants 1 to 4 against defendants 5 to 7, the defence mainly was that it was not maintainable in the absence of certain persons, who, like the defendants 1 to 4, had obtained decrees against defendants 5 to 7 and had attached the property in dispute, and the plaintiff preferred claims against the said attachments, but they were rejected upon adjudication. *Held*, that inasmuch as the absent decree-holders had applied for attachment and sale of the property in dispute in execution of their decrees and had successfully resisted the claim of the plaintiff, the plaintiff had a right to some relief against them (the absent decree-holders) in respect of the matter involved in the suit, and as their presence was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, the absent decree-holders were necessary parties to it, and the plaintiff not having brought them on the record as defendants the suit was not maintainable. DURGA CHARN SARKAR v. JOTINDRA MOHAN TAGORE, 27 C. 493 ... 325

(2) Non-joinder of—See HINDU LAW (JOINT FAMILY), 27 C. 724.

(3) To suit—See APPEAL (GENERAL), 27 C. 670.

(4) See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 479.

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(5) See Civ. Pro. Code (Act XIV of 1882), 27 C. 242.
(6) See Crim. Pro. Code (Act V of 1898), 27 C. 892, 918.
(7) See Limitation, 27 C. 285, 540.

Partnership,

Assignment by plaintiff's partners of their shares—Decree for winding up and for an account.—The plaintiff, as a partner in lending a sum of money upon security given, had a half share in the joint adventure with the first and second defendants. These two, without the plaintiff's exonerating them from liability to him, had assigned their shares to two other persons. The assignees were added as co-defendants after this suit had been filed claiming a decree for a judicial winding up, and for an account. It was not proved that the plaintiff had ever relinquished his claim upon the assignors as a partner, though he might have been aware of the assignment. The two added defendants appeared in the Court below, but not upon this appeal. *Held*, that the facts were sufficient to entitle the plaintiff to have the winding up of the partnership and the account decreed against all the four. The suit had been dismissed by the Recorder as having been prematurely brought before the complete execution of a decree, already obtained before this suit was filed, by the plaintiff-appellant, against the borrowers of the money; that decree having followed upon an award of arbitrators which directed that all sums realized in the adventure should be divided in equal moieties between the plaintiff and the original defendants. *Held*, that this suit ought to have been allowed to proceed, and should not have been dismissed. The plaintiff having, on this appeal, agreed to account for all money received by him in the transaction, an account should be directed with a declaration that the added defendants were jointly and severally liable to account, with the first and second defendants, for what had been received by them from the adventure. Domaty Nursiah v. Ramen Chetty, 27 C. 93 (P.C.) = 26 I.A. 202 = 7 Sar. P.C.J. 615 ... 61

Penal Code (Act XLV of 1860).

(1) S. 24—See Summary Trial, 27 C. 501.
(2) S. 83—See Act VIII of 1897 (Reformatory Schools), 27 C. 133.
(3) S. 114—See Penal Code (Act XLV of 1860), 27 C. 144.
(4) S. 114—See Rioting, 27 C. 566.
(5) S. 143—See Charge, 27 C. 660.
(6) S. 143—See Recognizance to keep peace, 27 C. 983.
(7) S. 144—See Crim. Pro. Code (Act V of 1898), 27 C. 658.
(8) S. 147—See Charge, 27 C. 990.
(9) S. 149—See Rioting, 27 C. 566.
(10) S. 161—See Penal Code (Act XLV of 1860), 27 C. 144.
(11) S. 174—See Contempt, 27 C. 985.
(12) S. 177—See Complaint, 27 C. 985.
(13) S. 182—See Sanction for Prosecution, 27 C. 452.
(14) Ss. 191, 193—See False Evidence, 27 C. 455.
(15) Ss. 193, 196—See False Evidence, 27 C. 820.
(16) S. 211—See False Charge, 27 C. 921.
(17) S. 213—See Accomplice, 27 C. 925.
(18) *S. 218—"Charged," Meaning of, in that section—Crim. Pro. Code (Act* V *of* 1898), *s.* 4, *cls.* (*f*), (*n*)—*Cognisable offence—Offence under Gambling Act* (*Bengal Act* II *of* 1867)—*Accomplice—Witness present on the occasion of the giving of a bribe—Penal Code, ss.* 114 *and* 161—*Illegal gratification —Abetment of offence of giving bribes.*—The District Superintendent of Police gave a warrant under the Gambling Act (Bengal Act II of 1867) to *D.*, a Sub-Inspector, to arrest persons found gambling in a certain house. In order to save two persons from legal punishment for having committed an offence under the Gambling Act in that house *D* framed a first information and a special diary incorrectly. *Held*, he was properly charged with, and found guilty of, having committed an offence under

Penal Code (Act XLV of 1860)—(*Concluded*). PAGE

s. 218 of the Penal Code. The word "charged" in that section is not restricted to the narrow meaning of "enjoined by a special provision of law." An offence under the Gambling Act, being an offence for which the District Superintendent of Police may arrest or by warrant direct an arrest, is a cognizable offence within the meaning of s. 4. cl. (*f*) of the Crim. Pro. Code. The words "a Police Officer," in that clause do not mean "any and every police officer"; it is sufficient if the Legislature by any law limits the power of arrest to any particular class of Police Officers. *D* and *F*, a Head Constable, were also charged under s. 161, and s. 161 read with s. 114 of the Penal Code, respectively, and it was contended that these charges were not sustainable, because they rested entirely on the testimony of persons alleged to have been accomplices who had not been corroborated in material particulars. *Held*, the mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe or was instrumental in the negotiations for the payment. QUEEN-EMPRESS v. DEODHAR SINGH, 27 C. 144 ... 95

(19) S. 224—See ARREST, 27 C. 320.
(20) S. 225—See ARREST, 27 C. 366.
(21) S. 302—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 368.
(22) S. 325—See RIOTING, 27 C. 566.
(23) S. 342—See ACCOMPLICE, 27 C. 925.
(24) S. 342—See WITNESS, 27 C. 370.
(25) S. 350—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 174.
(26) Ss. 351, 352—See MALICIOUS PROSECUTION, 27 C. 532.
(27) Ss. 360, 361, 363—See KIDNAPPING, 27 C. 1041.
(28) S. 379—See CHARGE, 27 C. 660, 990.
(29) S. 379—See HIGH COURT, 27 C. 654.
(30) S. 379—See SUMMARY TRIAL, 27 C. 501.
(31) S. 384—See ACCOMPLICE, 27 C. 925.
(32) S. 401—See EVIDENCE, 27 C. 139.
(33) S. 408—See PRESIDENCY MAGISTRATE, 27 C. 461.
(34) S. 426—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 658.
(35) S. 457—See HIGH COURT, 27 C. 654.
(36) Ss. 467, 468, 471—See FALSE EVIDENCE, 27 C. 820.
(37) Ss. 485, 486—See TRADE MARK, 27 C. 776.
(38) S. 500—See DEFAMATION, 27 C. 262.
(39) S. 503—See MALICIOUS PROSECUTION, 27 C. 532.

Peon.

See ARREST, 27 C. 457.

Place.

Open, meaning of—See ACT V OF 1861 (POLICE), 27 C. 655.

Plaint.

(1) Presentation of—See LIMITATION, 27 C. 376, 814.
(2) Registration of—See LIMITATION, 27 C. 376.

Plaintiff.

Non-appearance of, dismissal of suit for—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 217.

Pleader.

(1) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 529.
(2) See SECURITY FOR GOOD BEHAVIOUR, 27 C. 656.

Pleading.

Fraud—See FRAUD, 27 C. 11.

Police. PAGE

Obligation to show authority on which they act—See ARREST, 27 C. 320.

Police Officer.

(1) See ARREST, 27 C. 457.

(2) See PENAL CODE (ACT XLV OF 1860), 27 C. 144.

(3) See SANCTION FOR PROSECUTION, 27 C. 452.

Police Report.

See SANCTION FOR PROSECUTION, 27 C. 452.

Possession.

(1) After sale in execution of decree—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 34.

(2) And foreclosure, suit for—See MORTGAGE (BY CONDITIONAL SALE), 27 C. 185.

(3) Conflicting evidence of—See LIMITATION, 27 C. 25.

(4) Gift without—See HINDU LAW (GIFT), 27 C. 242.

(5) Order of Criminal Court as to—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 981.

(6) Suit for—See GRANT, 27 C. 156.

(7) Suit for, after rejection of claim—See LIMITATION ACT (XV OF 1877), 27 C. 212.

(8) See BURDEN OF PROOF, 27 C. 221.

(9) See TITLE, 27 C. 943.

Pottah.

"Dawami" made by grantee in excess of his estate—See GRANT, 27 C. 156.

Practice.

(1) *Attorney's costs—Summary jurisdiction—Collusive and fraudulent compromise to deprive attorney of his costs.*—An attorney applied for an order that the plaintiff and the defendant, or either of them, should pay to him his taxed costs on the ground that they had fraudulently and collusively compromised the suit with the object of depriving him of his costs. *Held*, that in cases of this kind, where charges of fraud and collusion are made, it is inconvenient for the Court to dispose of the issues on affidavits alone. *Held*, also, that it is not the practice of the Court to interfere summarily between attorneys and their clients as regards claims for costs. RAMDOYAL SEROWGIE v. RAMDEO, 27 C. 269 = 4 C.W.N. 208 178

(2) *Cases to be entered in the list of suits for liquidated claims—Rules* 281, 284 *(High Court, Original Side)—Removal of cases improperly entered in that list—Ordinary mortgage suit.—Held*, that the practice of the Court having been for many years to place ordinary mortgage suits on the list of suits for liquidated claims in the view that the incidental relief sought in such suits did not prevent them from being regarded as suits in which the claim was in substance a claim only for a liquidated demand in money, the practice should be adhered to. *Held*, also, that when a suit is transferred from the general list of causes (at the instance of the plaintiff) it is desirable that this should be done on notice to the defendant, so that he may not be taken by surprise. BENODE LALL ROY v. BUSSUNTO KUMARY DEBI, 27 C. 355 ... 234

(3) *Filing paper-books for appeal—Application for enlargement of time to file paper books—Subsequent application at the hearing of the appeal to file paper book then ready—Discretion of Court—Sufficient cause—High Court Rules, Appellate Side, chap.* 7, *r.* 11.—An extension of time for filing paper books in an appeal will not be granted unless "sufficient grounds" be shown for granting the application. Where the appellants waited from the 13th August 1898, the date of filing their memorandum of appeal, till the 22nd September 1898, before applying for office copies of the necessary papers to enable them to prepare their paper books, and an application was made by the appellants on the 12th December 1898, for two months further time to file their paper books, the delay between the 13th August and the 22nd September 1898 being unexplained. *Held*, that no sufficient cause had been shown for extension of time, nor was the case altered by the fact that the paper books were ready when a subsequent application was made

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on the appeal being called on for hearing, and an application for leave to file them was consequently dismissed. MOTI CHAND v. FOOL CHAND, 27 C. 57 ... 38

(4) *Filing of paper-books in appeal—Application for extension of time.*—Unless sufficient cause is shown, an extension of time for filing of paper-books will not be granted. GOPAL CHUNDER DAS v. RADHABULLUBH DAS, 27 C. 60-N. ... 40

(5) See PRIVY COUNCIL, 27 C. 1, 333.

(6) See SALVAGE, 27 C. 860.

Prescription.

See BURDEN OF PROOF, 27 C. 221.

Presidency Magistrate.

(1) *Judgment of—Sentence of imprisonment—Reasons for conviction to be recorded —Code of Criminal Procedure* (*Act* V *of* 1898), *s.* 370, *cl.* (*i*)—*Penal Code* (*Act* XLV *of* 1860), *s.* 408.—Section 370 of the Code of Criminal Procedure requires that in a case in which the accused is sentenced to imprisonment a Presidency Magistrate shall record a brief statement of the reasons for the conviction. It is not sufficient for him to record that the offence is proved, for that may necessarily be implied to be his opinion from the fact that he has convicted the accused. The law contemplates something further as the reason for the conviction. NATABAR GHOSE v. PROVASH CHANDRA CHATTERJEE, 27 C. 461=4 C.W.N. 467 ... 303

(2) Proceeding of—See REVISION, 27 C. 126.

Presumption.

(1) As to possession—See LIMITATION, 27 C. 25.

(2) See LANDLORD AND TENANT, 27 C. 570.

Priest.

See RIGHT OF SUIT, 27 C. 30.

Principal and Agent.

See LANDLORD AND TENANT, 27 C. 663.

Privy Council.

(1) *Practice of—Petition for special leave to appeal—Reasons omitted in order admitting to review—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 626.—With reference to the requirement in s. 626 of the Civ. Pro. Code that reasons should be recorded by the Judge granting an order of admission to review, the mere omission to record them was not held a ground for granting special leave to appeal from the order or from the decree, which was subsequently made. SHANKAR BAKSH v. BULWANT SINGH, 27 C. 333 (**P.C.**) =27 I.A. 79=4 C.W.N. 203=2 Bom. L.R. 596=7 Sar. P.C.J. 686 ... 220

(2) *Practice of—Stay of proceedings in India pending appeal—Protection of property pending an appeal by special leave—Order for stay of proceedings—Civ. Pro. Code* (*Act* XIV *of* 1882), *Chap.* XLV.—Special leave of Her Majesty in Council was obtained for the filing an appeal from a decree of the High Court affirming the dismissal of the petitioner's suit. The High Court rejected his application as plaintiff (appellant) for an order staying execution and continuing the possession of a manager of the estate in litigation pending the result of the appeal. The rejection was grounded on the absence of authority for this purpose, the High Court being authorized, in their judgment, only to make such an order in regard to appeals admitted by themselves. On this petition that the High Court's decision might be reversed, or such order made as would protect the property to abide the ultimate disposal of the suit, their Lordships were of opinion that direct interference to continue the management or to appoint a Receiver, was impracticable. But that, on the other hand, interference had, on occasion, been effected where the appellant being in possession, an order for stay of proceedings had maintained the existing state of things. Therefore, an order staying proceedings should now be recommended by them, the petitioner being answerable in damages, and any

Privy Council—(*Concluded*). PAGE

aggrieved respondent having leave to move for the discharge of the order, MOHESCHANDRA DHAL v. SATRUHGAN DHAL; *Ex parte* MOHESCHANDRA DHAL, 27 C. 1 (P.C.) = 26 I.A. 281 = 4 C.W.N. 34 = 7 Sar. P.C.J. 567 ... 1

Probate.

(1) *Caveat—Propounder of will—Right of person cognisant of proceedings and not objecting to re-open them—Caveator—Costs.*—A party cognisant of proceedings in an action for probate or letters of administration and not objecting to the grant is not as a rule entitled to have the matter re-opened and the grant revoked. In this case he was allowed to re-open the case under certain circumstances and upon certain conditions. *In the goods of* BHUGGOBUTTY DASI, 27 C. 927 = 4 C.W.N. 757 ... 606

(2) Clerical error in, order refusing to amend—See APPEAL (GENERAL), 27 C. 5.

(3) *Evidence.*—Probate is rightly granted where the Judge believes the witness who speaks to the execution of the will and the disposing mind of the testator. The rule in *Tyrrell* v. *Painton* (L. R., 1894), p. 151, requiring proof that the testator actually knew and approved the contents of the will does not apply, unless surrounding circumstances excite suspicion. SHAMA CHARN KUNDU v. KHETTROMONI DASI, 27 C. 521 (P.C.) = 27 I.A. 10 = 2 Bom L.R. 568 = 4 C.W.N. 501 = 7 Sar. P.C.J. 638 ... 343

(4) *Minor—Special citation—Probate and Administration Act* (V *of* 1881), *ss* 50, 83—*Procedure—Service of Summons—Code of Civil Procedure Act* (XIV *of* 1882), *ss.* 443, 647.—Where executors applied for probate and there was living a minor widow entitled to maintenance and residence under the will. *Held*, that a special citation should issue upon the widow and be served personally on her and on her father with whom she resided. *In the goods of* AMRITA LAL MULLICK, 27 C. 350 ... 231

(5) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 27 C. 683.

Procedure.

(1) For Probate or Letters of Administration, re-opening of—See PROBATE, 27 C. 927.

(2) See ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT), 27 C. 131.

Professional Misconduct.

See ACT XVIII OF 1879 (LEGAL PRACTITIONERS'), 27 C. 1033.

Prohibitory Order.

See ATTACHMENT, 27 C. 38.

Property.

Restoration of possession of—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 174.

Public Document.

See EVIDENCE ACT (I OF 1872), 27 C. 639.

Public Way.

See RIGHT OF SUIT, 27 C. 793.

Purchase-money.

Interest on—See SALE, 27 C. 308.

Purchaser.

(1) Application by, to set aside sale or for compensation—See SALE, 27 C. 264.

(2) At revenue sale—See SALE, 27 C. 290.

(3) See HINDU LAW (MAINTENANCE), 27 C. 551.

Putnidar.

See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 535.

Question.

(1) In execution of decree—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 34, 187, 242.

(2) Of law and fact raised in appellate Court—See APPELLATE COURT, 27 C. 205.

(3) See APPEAL (GENERAL), 27 C. 670.

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 415.

Receipts.

(1) For rent—See MESNE PROFITS, 27 C. 951.

(2) Granting unstamped—See STAMP ACT (I OF 1879), 27 C. 324.

(3) Proof of demand of—See STAMP ACT (I OF 1879), 27 C. 324.

(4) Refusal to grant stamped—See STAMP ACT (I OF 1879), 27 C. 324.

Receiver.

(1) Appointment of—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 259.

(2) *Appointment of Receiver—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 508—*Discretion of Court—Waste.*—The removal of a large amount of property by the defendant, and under circumstances which might fairly give rise to suspicion during the pendency of the suit in which the question of title to that property would be determined, is a sufficiently strong ground for the appointment of a Receiver. SIA RAM DAS v. MAHABIR DAS, 27 C. 279 = 5 C.W.N. 362 ... 184

Recognizance to keep Peace.

Conviction under s. 143 *of the Penal Code* (*Act* XLV *of* 1860)—*Code of Criminal Procedure* (*Act* V *of* 1898), *s.* 106.—An offence under s. 143 of the Penal Code is not one of the offences specified in s. 106 of the Code of Criminal Procedure which would justify an order directing a person or persons to furnish security to keep the peace. There may be findings in the case which would justify such an order if such findings can be brought within the terms of s. 106. Where the accused were convicted under s. 143 of the Penal Code and ordered under s. 106 of the Code of Criminal Procedure to furnish security to keep the peace, and it was alleged that the facts as proved showed that the accused came in a body, some of whom were armed with *lathis* and some of whom used threats and did other acts, showing an evident intention to commit breaches of the peace. *Held*, that there should have been an express finding to that effect; that if the accused or any of them acted in such a manner, they should have been convicted of criminal intimidation or other offence which would enable the Magistrate to bind them over to keep the peace; and that the order under s. 106 should be set aside. SHEO BHAJAN SINGH v. MOSAWI, 27 C. 983 = 4 C.W.N. 795 ... 643

Record of Rights.

See JURISDICTION OF, 27 C. 167.

Reference.

(1) For trial by Subordinate Magistrate—See MAGISTRATE, 27 C. 979.

(2) To arbitration not in writing—See ARBITRATION, 27 C. 61.

(3) *To High Court—Crim. Pro. Code* (*Act* V *of* 1898), *s.* 307—*Power of Judge in dealing with evidence.*—In making a reference under s. 307 of the Code of Criminal Procedure the Sessions Judge is limited to the evidence at the trial which was before the jury. QUEEN-EMPRESS v. JADUB DAS, 27 C. 295 = 4 C.W.N. 129 ... 194

Registered Proprietor.

Representative of—See ACT VII OF 1876 (LAND REGISTRATION, BENGAL), 27 C. 178.

Registration.

(1) Of deed of sale—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 7.

(2) See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 358.

Registration Act (III of 1877).

Ss. 17 (*h*), 48, 50—See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 468.

Regulation VIII of 1819 (Bengal Patni Taluks).

S. 8—See SALE, 27 C. 308.

Regulation XI of 1825 (Bengal Alluvion and Diluvion).

S. 4, *sub-ss.* 1 *and* 5—*Changes in a river's channel—Rights of riparian owners—Accretion by alluvion distinguished.*—The current of a river changing its course encroached upon either bank alternately detaching land from one bank, followed by the effect that land was added to the opposite bank. The river having taken a course more to the east than its original one,

Regulation XI of 1825 (Bengal Alluvion and Diluvion)—(*Concluded*). PAGE

the area of the defendants' village (till then only partly on the western side inasmuch as the river traversed it throughout) appeared entirely on the west bank. Some land of the plaintiff's village on the eastern side was also carried away, the river continuing its eastward tenancy. By another change, in the opposite direction, the current resumed its original channel more towards the west with the effect that the piece of land that had belonged to the defendant's village, and had been submerged when on the east bank during the above change in the river's course emerged in the end on its former site on the east bank. This restored land was identifiable. But the owner of the village on the east bank now claimed it as an accretion by alluvion to his property which it adjoined. *Held*, that the right of property remained in the original owner, the defendant. The owner of the adjoining village on the eastern side could not make out a title to it either under sub-s. 1, under sub-s. 5 of s. 4 of Reg. XI of 1825, or in virtue of any known principle. There was no proof of a custom giving this land to him on account of contiguity, and there had been no gain to him from the river by alluvion within the meaning of the Regulation. JAGGOT SINGH v. BRIJ NATH KUNWAR, 27 C. 768 (P.C.) = 27 I.A. 81 = 4 C.W.N. 555 = 7 Sar. P.C.J. 699. 502

Relevant Fact.

See FRAUD, 27 C. 11.

Remuneration.

See ACT II OF 1886 (INCOME TAX), 27 C. 674.

Rent.

(1) Arrears of—See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 479.

(2) Dispute regarding right to collect—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 259, 892.

(3) Suit for—See ACT VII OF 1876 (LAND REGISTRATION. BENGAL), 27 C. 178.

(4) Suit for—See LANDLORD AND TENANT, 27 C. 67, 205, 663.

(5) *Suit for no alternative claim for use and occupation—Damages for use and occupation—Variance between pleading and proof—Ferry tolls.*—In a suit for rent, when no alternative claim is made for use and occupation, no damages can be decreed for use and occupation. RACHHEA SINGH v. UPENDRA CHANDRA SINGH, 27 C. 239 ... 158

(6) See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 417, 476, 535.

(7) See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 27 C. 827.

(8) See APPEAL (SECOND APPEAL), 27 C. 508.

(9) See LANDLORD AND TENANT, 27 C. 789.

(10) See SALE, 27 C. 545.

Reputation.

See SECURITY FOR GOOD BEHAVIOUR, 27 C. 993.

Restoration.

Of possession of property—See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 172.

Re-trial.

Power of Appellate Court to order—See SESSIONS JUDGE, 27 C. 17.

Revenue.

Liability for—See DECREE, 27 C. 103.

Revenue Court.

See FALSE EVIDENCE, 27 C. 820.

Revenue Officer.

Decision of—See JURISDICTION, 27 C. 167.

Revenue-paying Estate.

Sale of—See LIMITATION ACT (XV OF 1877), 27 C. 180.

Revision. PAGE

(1) *High Court's power in revision—Hearing of rule to show cause—Discretion of Court—Crim. Pro. Code (Act* V *of* 1898), *s.* 439.—Discretion of the High Court in revision at the hearing of a rule to consider and decide matters in respect to which a rule had been prayed for, but not granted. DURGA DASS RUKHIT v. QUEEN-EMPRESS, 27 C. 820 ... 537

(2) *High Court's power of Revision—Presidency Magistrate. Proceedings of—Order for further inquiry—Crim. Pro. Code* (V *of* 1898), *ss.* 423, 435, 439 —*High Court's Charter Act* (24 *and* 25 *Vic.*, *c.* 104), *s.* 15—*Letters Patent, High Court,* 1865, *cl.* 28.—The High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate by reason not of s. 28 of the Letters Patent, 1865, but of s. 15 of the Charter Act (24 and 25 Vic., c. 104). That section has always been interpreted in a very extended meaning so as to give ample powers of superintendence, that is to say, powers of revision over proceedings of subordinate Courts. But the High Court has no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal or discharge passed by a Presidency Magistrate. A Presidency Magistrate acting under s. 203 of the Crim. Pro. Code dismissed a complaint on the report of the police without examining the complainant and without finding on such examination that there was no sufficient ground for proceeding. The High Court, acting under s. 15 of the Charter Act, ordered a further inquiry to be made into the matter of the complaint. CHAROOBALA DABEE v. BARENDRA NATH MOZUMDAR, 27 C. 126=3 C.W.N. 601 ... 83

(3) See CRIM. PRO. CODE (ACT V OF 1898), 27 C. 892.

Right of Occupancy.

(1) Transferability of—See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 473.

(2) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 187.

Right of Suit.

(1) *For declaration and enforcement of a hereditary right to officiate as priest—Code of Civil Procedure (Act* XIV *of* 1882), *s.* 11—*Mesne profits—Suit to have a share in the offerings made to a deity, by one member of family, against another based upon an implied arrangement amongst them.*—A suit by one member of a family against another, for the declaration and enforcement of a hereditary right to officiate as priest at the worship performed by votaries at the foot of a certain tree, and also to have a share in the offerings made to the deity, is maintainable. DINO NATH CHUCKERBUTTY v. PRATAP CHANDRA GOSWAMI, 27 C. 30=4 C.W.N. 79 ... 21

(2) *Fraud—Sale in execution of* ex-parte *decree—Suit to set aside a sale on the ground of fraud, challenging the decree in execution of which the sale took place as fraudulent, although the said decree was set aside on the ground of non-service of summons—Civ. Pro. Code (Act* XIV *of* 1882), *ss.* 108 *and* 244.—An *ex-parte* decree for rent was obtained against *A* and others, and in execution of that decree certain lands of the judgment-debtors were sold and were purchased by a third party. Subsequently, at the instance of *A* the said *ex-parte* decree was set aside on the ground of non-service of summons, and the original suit was restored, but that was dismissed for default, as the then plaintiff did not proceed with it. An application was then made by *A* to set aside the sale on the ground of fraud which was rejected because the auction-purchaser was not made a party to the proceedings. *A* then brought a suit for declaration of title to a portion of the land sold and for confirmation of possession, challenging not only the sale, but also the decree, on the ground of fraud. The defence mainly was that regard being had to the provisions of s. 244 of the Civ. Pro. Code the suit was not maintainable. *Held* that, although there was no decree to be actually set aside, the plaintiff was entitled to show that the decree under which the sale was held was obtained by fraud as against him, and that therefore the suit was maintainable. RAM NARAIN TEWARI v. SHEW BHUNJAN ROY, 27 C. 197 ... 130

(3) *Jurisdiction of Civil Court—Obstruction to public way—Suit by zemindar for removal of obstruction—Special damage—Special inconvenience—Cause of action.*—No suit lies for the removal of an obstruction to a public way, unless the plaintiff proves special damage from the obstruction; and this

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equally applies whether the plaintiff is a zemindar or any ordinary member of the community. RAJ NARAIN MITTER v. EKADASI BAG, 27 C. 793. 520

(4) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 242.

Right of Way.

See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 364.

Rioting.

(1) *Acquittal of rioting and conviction of grievous hurt—Constructive guilt—Abetment—Penal Code* (*Act* XLV *of* 1860), *ss.* 114, 325, *with* 149.—Where the accused persons have been acquitted of rioting, they cannot be properly convicted of grievous hurt under s. 325 by the application of s. 149 of the Penal Code, where it has not been found that these persons or any of them were members of an unlawful assembly in prosecution of the common object, of which grievous hurt was caused by any other members of the same assembly, or that the offence was such as each member of the assembly knew to be likely to be committed in prosecution of that object. The mere presence as an abettor of any person would not, under the terms of s. 114 of the Penal Code, render him liable for the offence committed. In order to bring a person within s. 114 of the Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that, if absent, he would have been liable to be punished as an abettor, and then to show that he was also present when the offence was committed. ABHI MISSER v. LATCHMI NARAIN, 27 C. 566=4 C.W.N. 546 ... 372

(2) With common object of theft—See CHARGE, 27 C. 990.

Riparian Owners.

See REGULATION XI OF 1825 (BENGAL ALLUVION AND DILUVION), 27 C. 768.

Riparian Proprietors.

Right of—See BURDEN OF PROOF, 27 C. 221.

Rules.

(1) Bengal Government, r. 3, ch. 1—See LANDLORD AND TENANT, 27 C. 774.

(2) Framed by Local Government—See ACT VIII OF 1897 (REFORMATORY SCHOOLS), 27 C. 133.

(3) Of High Court, Calcutta—See SALE, 27 C. 261.

(4) Appellate side, ch. V, r. 5—See FULL BENCH, 27 C. 839.

(5) Ch. VII, r. 11—See PRACTICE, 27 C. 57, 60-N.

(6) R. 284—See PRACTICE, 27 C. 355.

(7) To show cause, hearing of—See REVISION, 27 C. 820.

Sajjadanashin.

Khankah—See ACT II OF 1886 (INCOME TAX), 27 C. 674.

Salary.

See ACT II OF 1886 (INCOME TAX), 27 C. 674.

Sale.

(1) Completion of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 7.

(2) *For arrears of rent—Reg* VIII *of* 1819, *s.* 8, *cls.* *(2) and* (14)—*Formalities prescribed in that section for due publication of the notice of sale—Rights of auction-purchaser on sale being set aside—Interest on purchase-money.*—In cases where the due publication of the sale notice is in controversy, it is incumbent upon the landlord to show that the formalities prescribed by s. 8 of Reg. VIII of 1819 have been complied with. Under s. 14 of Reg. VIII of 1819, when a *putni* sale is set aside, the auction-purchaser is entitled to get back the purchase-money with interest. BEJOY CHUND MAHATAB v. AMRITA LAL MUKERJEE, 27 C. 308 ... 203

(3) *Sale of a* jama *in execution of a decree for rent obtained against one of the heirs of the last regarded tenant, from whom the landlord chose to accept rent separately and who was not recorded in the landlord's Sheristha—Effect of such a sale—Bengal Tenancy Act* (VIII *of* 1885), *s.* 26.—The plaintiffs sued to recover possession of their share of certain rent-paying lands on

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the allegation that they were entitled to a one-third share of these lands by inheritance from the last regarded tenant, and another one-third share by purchase from one of the heirs; that the defendants Nos. 2 and 3 were entitled to the remaining one-third share; that for some years they and the said defendants have been paying rent to the landlord and obtaining separate rent receipts; that the defendants Nos. 2 and 3 in collusion with the landlord allowed a decree to be passed against them in respect of the entire *jama*, in execution of which the said lands were sold and purchased by defendant No. 1. The defence of defendant No. 1 *inter alia* was that as the rent suit brought by the landlord was against the person who was the *Sarbarakar* or Manager of the *jama*, therefore by the sale in execution of the decree obtained in that suit the entire *jama*, passed. *Held* that, as the landlord was bound to recognize the plaintiffs as tenants in the place of the last recorded tenant, and, also as he chose to accept rent from the plaintiffs, and the defendants Nos. 2 and 3 separately, he had no right to ignore the plaintiffs and proceed only against the defendants. The entire *jama* did not pass by the sale, and the plaintiffs' right was not affected thereby. ANANDA KUMAR NASKAR v. HARI DASS HALDAR, 27 C. 545=4 C.W.N. 608 ... 365

(4) *Sale of an under-tenure in execution of decree—Bengal Act VIII of 1865—Execution—Attachment—Sale proclamation—Joint interest of three brothers in joint possession validly sold.—Land Tenure.*—A zemindar brought to a judicial sale an under-tenure in execution of three *ex parte* decrees obtained by him for arrears of rent thereof, for different periods. The property was held by three Hindu brothers in joint possession. The zemindar purchased it at the sale. At the instance of the zemindar execution had been issued against only one of the brothers. Another of them, referring to this, afterwards disputed the validity of the sale, and claimed his one-third share, alleging, as the fact was, that the decrees had not, each and all of them, been against each and all of the three brothers, and that the sale was invalid. One at least of the three decrees was against the three brothers, who all understood that they were judgment-debtors under the decrees. They had been served with proper notices under Act VIII of 1865, and sparate attachments of the land under each decree, and separate proclamations of sale thereunder, had been made. *Held*, that the sale was a valid one, and operate to transfer the tenure to the purchaser. TARA LAL SINGH v. SAROBAR SINGH, 27 C. 407 (P.C.)=27 I.A. 33=4 C.W.N. 533=2 Bom. L.R. 5=7 Sar. P.C.J. 657 ... 269

(5) For arrears of revenue—See LIMITATION ACT (XV OF 1877), 27 C. 180.

(6) *Purchaser at a revenue sale—Act XI of 1859, ss 28, 35 and 37—"Entire estate," Meaning of—Effect of estate being recorded under a district number on the rent roll, with a separate revenue assessed upon it—Protected interest.*—When an estate is recorded under a distinct number on the *touzi* or rent-roll of the Collector with a separate revenue assessed upon it, and the sale certificate granted to the auction-purchaser under s. 28 of Act XI of 1859 shows that the estate sold was an entire estate, the mere fact of it comprising undivided shares in certain villages does not prevent its being an entire estate. PREONATH MITTER v. KIRAN CHANDRA ROY, 27 C. 290 ... 191

(7) In execution of decree—See JURISDICTION, 27 C. 272.

(8) See RIGHT OF SUIT, 27 C. 197.

(9) *Sale by Sheriff—Civ. Pro. Code (Act XIV of 1882), s. 244, cl. (c), and ss. 287, 311, 313—Belchamber's Rules and Orders of High Court, Calcutta, 382, 386—Deficiency in area of land—Application by purchaser to set aside sale or for compensation.*—A purchaser at an execution sale of immoveable property held by the Sheriff applied to set aside the sale or for compensation on the ground of deficiency in the area of the land sold. *Held*, that such an application in relation to sales held by the Sheriff was not sanctioned by any provisions of the Civ Pro. Code, and s. 313 did not apply. *Held*, also, that as the interest of the purchaser was adverse to the interest of the judgment-debtor the former was not the representative in interest of the latter, and therefore s. 244 of the Civ. Pro. Code did not apply. Sales by the Sheriff differ from sales by the Registrar of the Original Side of the High Court. The rules of the Court governing sales by the Registrar direct that compensation shall be allowed for errors and mis-statements, if capable of compensation, while no such condition is imposed

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on sales by the Sheriff. RAM NARAIN v. DWARKA NATH KHETTRY, 27 C. 264 = 4 C.W.N. 13 ... 174

(10) Proceeds, lien of mortgage on balance of—See LIMITATION ACT (XV OF 1877), 27 C. 180.

(11) See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 810.

(12) See LANDLORD AND TENANT, 27 C. 789.

Sale Proclamation.

(1) See LANDLORD AND TENANT, 27 C. 789.

(2) See SALE, 27 C. 407.

Salvage.

Service to a vessel in distress though not in imminent danger—Interruption of service by accident—Towage service convertible into salvage service—Distinction between towage and salvage service—The indicia of salvage service—Costs—Practice of the Court in giving costs.—Any service rendered to a vessel in a state of peril or risk or otherwise in distress, which contributes in some degree to its ultimate safety entitles the person rendering the service to salvage reward. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction, if the services were not rendered. Services rendered to a ship which is in a normal condition, and has received no injury, and needs nothing more than expedition, or acceleration of progress, will be treated as mere towage; it is otherwise in the case of a vessel which is in a disabled condition or has received substantial injury. In considering the question whether the service was of the nature of salvage service, the risks of navigation, the difficulty under which it was performed, and the danger in performing it, have all to be taken into consideration. An ordinary towage service may, in consequence of supervenient danger, be converted into salvage service; but the right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct, or gross negligence on the part of the salvors. The mere fact that the service was interrupted by accident or some like cause, if it has been productive of benefit to the owners of the vessels, will not disentitle the salvors from their reward. In assessing the award the Court will take into consideration not only the danger and difficulties to which the salvor was exposed, but also the skill with which the work was performed. The shortness of service may often be taken as showing extraordinary skill and labour. When two separate salvage actions are consolidated at the instance of the common impugnant, and no order is made giving the conduct of both to one plaintiff, the promovents are entitled to separate costs. Practice of the Court followed, and costs given on the ordinary scale provided for in the rules under the Civ. Pro. Code, and not under the schedule relating to Vice-Admiralty actions. *In the matter of the* STEAMSHIP DRACHENFELS, 27 C. 860 ... 562

Sanction for Prosecution.

(1) *Crim. Pro. Code* (*Act* V *of* 1898), *ss.* 190, 195, 476—*Application for sanction—To whom it should be granted*—Sanction under s. 195 of the Code of Criminal Procedure should be given only on application made for it by some person, who may desire to complain of the particular offence and whose complaint could not be entertained without such sanction. DURGA DASS RUKHIT v. QUEEN-EMPRESS, 27 C. 820 ... 537

(2) *Information by accused of offence—Report by police of falsity of information—Sanction by District Magistrate on police report—Judicial proceeding—Subordination of police officer to District Magistrate—Complaint—Criminal Code* (*Act* V *of* 1898), *ss.* 195 *and* 480—*Penal Code* (*Act* XLV *of* 1860), *s.* 182.—The accused gave certain information to the police, who after investigating the matter reported that the information given was false and constituted an offence under s. 182 of the Penal Code. The District Magistrate on this sanctioned the prosecution of the accused, who was convicted and sentenced under that section. The accused appealed against the convictions and sentence. His appeal was heard and dismissed by

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the District Magistrate, who had previously sanctioned his prosecution. On revision the accused contended that the District Magistrate having sanctioned his prosecution on the police report was not competent to hear the appeal. *Held*, that s. 487 of the Code of Criminal Procedure did not apply as the offence was not committed before the District Magistrate, nor was it in contempt of his authority, nor brought to his notice in the course of a judicial proceeding. *Held*, further, that although police officers in a district were generally subordinate to the District Magistrate, the subordination contemplated by s. 195 of the Code of Criminal Proce- was not such subordination. That subordination contemplated some superior officer of police. Nor could the report of the police officer be regarded as a complaint under s. 195 of the Code of Criminal Procedure and therefore no proper sanction had been obtained. The defect, however, was cured by s. 537 of the Code of Criminal Procedure as no failure of justice had been occasioned. RAMASORY LALL v. QUEEN-EMPRESS, 27 C, 452=4 C.W.N. 594 ... 297

(3) See ACT XI OF 1878 (ARMS), 27 C. 692.

(4) See PARDON, 27 C. 137.

Saraogis.

See HINDU LAW (CUSTOM), 27 C. 379.

Search.

Legality of—See ACT XI OF 1878 (ARMS), 27 C. 692.

Security for Good Behaviour.

(1) *Discharge of person called upon—Further inquiry, Power to order, in such proceedings—Code of Criminal Procedure (Act V of 1898), ss. 110 and 437.*—A further inquiry cannot be made into the case of a person against whom proceedings under s. 110 of the Code of Criminal Procedure have been taken, and who has been discharged. If it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law, on fresh information received. The further inquiry which can be ordered under s. 437 of the Code of Criminal Procedure is into a complaint which has been dismissed or into the case of any accused person who has been discharged. Proceedings under s. 110 of the Code of Criminal Procedure cannot be regarded as on a complaint, nor can they be regarded as a case in which any accused person has been discharged, for the terms "accused person" and "discharge" in s. 437 of the Code of Criminal Procedure, clearly refer to a person accused of an offence who has been discharged from a charge of that offence within the terms of chap. XIX of the Code, QUEEN-EMPRESS v. IMAN MONDAL, 27 C. 662 ... 435

(2) *Habitual offenders—Acts committed by persons in performance of duties as burkandazes in zemindaris—Habitual association—Joint trial—Code of Criminal Procedure (Act V of 1898), ss. 110, 112, 117, 118 and 537.*—Certain *burkandazes* employed at a *kutchery* of the Bijni Estate, who were alleged to have committed acts of extortion and other acts of oppression in the performance of their duties, were called upon to execute bonds for their good behaviour on the grounds :—(1) That they habitually committed extortion ; (2) that they habitually commit or attempt to commit or abet the commission of offences involving a breach of the peace ; (3) that they are dangerous persons so as to render their being at large without security hazardous to the community. They were tried jointly by the Magistrate under s. 117 of the Code of Criminal Procedure, and each of them was ordered to execute a bond with sureties for his good behaviour for three years. *Held*, that even supposing the Magistrate was right in considering that there was habitual association between these persons in regard to the first and second grounds, there certainly would be no such connection between them in regard to their characters so as to make them dangerous persons, and thus to render their being at large without security hazardous to the community, and that proceedings should have been separately taken against each of them. S. 110 of the Code of Criminal Procedure is not applicable where certain acts amounting to extortion are committed by certain persons in the performance of their duties as *burkandazes* in a zemindari, as it cannot be said that these persons are in the habit of committing extortion as individual members of the community, because

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if they were discharged by the zemindar or ceased to be in his employ the acts would no longer be committed, it being no longer to their interest to do such acts in the interest of their employer, and they certainly would not be likely to commit them in their own private capacities. The object of enabling a Magistrate to take security for good behaviour is for the prevention, and not for the punishment of offences. HARI TELANG v. QUEEN-EMPRESS, 27 C. 781=4 C.W.N. 531 ... 511

(3) *Imprisonment in default of security—Reference to Sessions Judge—Accused —Notice—Right to be heard by pleader—Order of confirmation—Grounds for such order—Code of Criminal Procedure (Act* V *of* 1898), *ss.* 110, 123 *and* 340.—Where a reference is made to the Sessions Judge under s. 123 of the Code of Criminal Procedure, he is bound to give notice to the person concerned and also to hear his pleader, if he should be so represented. The term "accused" in s. 340 of the Code of Criminal Procedure applies to a person who is liable under s. 123 of that Code to imprisonment in default of giving security. The Sessions Judge in confirming the order of a Magistrate under s. 123 of the Code of Criminal Procedure in regard to the imprisonment of a person in consequence of his being unable to furnish the necessary security, is bound to find a special ground, on which the order is passed, having special reference to s. 110 of that Code. It is not sufficient where he only finds in general terms that it is for the interest of the community at large that such person should be bound over to be of good behaviour. NAKHI LAL JHA v. QUEEN-EMPRESS, 27 C. 656 ... 430

(4) *Jurisdiction of Magistrate over person not residing within his jurisdiction—Reputation—Code of Criminal Procedure (Act* V *of* 1898), *s.* 110.—It is only when a person within the limits of a Magistrate's jurisdiction, that is, who is residing within the limits of such jurisdiction, is found to be a person of the description given in s. 110 of the Code of Criminal Procedure, that the Magistrate can take action under that section, and it is not contemplated that the Magistrate in such a case should issue a warrant so as to pursue the person concerned into another jurisdiction. Under the terms of s. 110 of the Criminal Procedure Code, the reputation which the person is found to have means the reputation of that person in the neighbourhood in which he resides. KETABOI v. QUEEN-EMPRESS, 27 C. 993 ... 650

Sentence.

Enhancement of sentence—Crim. Pro. Code (V *of* 1898), *s.* 423—*Alteration of sentence on appeal—Effect of alteration.*—A sentence of three months' imprisonment was on appeal altered by the Sessions Judge to one month's imprisonment with a fine of Rs. 20, or in default of payment to 15 days' rigorous imprisonment. This alteration of sentence was held not to amount to an enhancement of the sentence such as was contrary to the terms of s. 423 of the Crim. Pro. Code. No general rule can be laid down to determine what is or is not an enhancement of sentence when only a portion of a sentence is altered to a punishment of a lesser degree of severity. In each case the Court has to consider what is the effect of the alteration. RAKHAL RAJA v. KHIRODE PERSHAD DUTT, 27 C. 175 ... 116

Separate Suits.

See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 34.

Sessions Judge.

(1) *Jurisdiction of—Criminal Procedure* (V *of* 1898), *s.* 423, *cl.* (*b*)—*Power of Appellate Court to order a re-trial.*—A conviction and sentence under s. 211 of the Penal Code by a Magistrate having jurisdiction to try the case, was on appeal set aside, and a new trial under the same section was directed by the Sessions Judge. It was contended that the power to order a new trial under s. 423, cl. (*b*), of the Crim. Pro. Code could only be exercised when the conviction and sentence was set aside for want of jurisdiction in the trying Magistrate. *Held*, that there is nothing in s. 423, cl. (*b*), of the Code to limit the power of an appellate Court to order a re-trial. SATIS CHANDRA DAS BOSE v. QUEEN-EMPRESS, 27 C. 172=4 C.W.N. 166 ... 113

(2) Power of, in dealing with evidence—See REFERENCE, 27 C. 295.

Set-off. PAGE

See LANDLORD AND TENANT, 27 C. 663.

Settlement.

See HINDU LAW (JOINT FAMILY), 27 C. 515.

Settlement Officer.

Jurisdiction of—See ACT VIII OF 1885 (BENGAL TENANCY), 27 C. 364.

Sheriff.

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Signature.

Acknowledgment of, by testator—See HINDU LAW (WILL), 27 C. 169.

Small Cause Court.

See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), 27 C. 827.

Special Damage.

See RIGHT OF SUIT, 27 C. 793.

Special Leave to appeal.

See PRIVY COUNCIL, 27 C. 1.

Specific Performance.

(1) *Contract relating to property of minor—Decree for specific performance.*—A decree for specific performance can be given against a minor when the Court finds that it is for the benefit of the minor that the contract should be performed. KHAIRUNNESSA BIBI v. LOKE NATH PAL, 27 C. 276 ... 182

(2) See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 468.

Specific Relief Act (I of 1877).

(1) *S.* 26—*Specific performance of a contract, suit for—Whether registration of an ekrarnamah was sufficient notice of the contract.*—Mere registration of an *ekrarnamah* is not sufficient notice of a contract within the meaning of s. 27 of the Specific Relief Act. PREONATH CHATTOPADHYA v. ASHUTOSH GHOSE, 27 C. 358=4 C.W N. 490 ... 237

(2) *S.* 27 (*b*)—*Suit for specific performance of contract to sell land—Person claiming by subsequent title—Notice of prior contract—Transfer of Property Act* (IV *of* 1882), *s.* 54 —*Contract for sale*—Bainanamah—*Legal and equitable rights—Registration Act* (III *of* 1877), *ss.* 17 (*h*), 48, 50—*Document creating a right to obtain another document—Unregistered document—Admissibility of evidence.*—On the 27th December 1895, *S* executed an unregistered document bearing a one-anna receipt stamp, in favour of *J*, agreeing to execute a deed of conveyance of certain immoveable property in favour of *J* within a certain time, and acknowledging receipt of earnest money. Subsequently on the 3rd January 1896, *S* executed a registered *bainanama* in respect of the same property in favour of *R* and *H*, which was followed by a registered deed of conveyance in their favour, dated the 9th January 1896, and delivery of possession, although, *R* and *H* had notice of the previous contract with *J* before the registration of the *bainanamah* and execution of the deed of conveyance in their favour. *Held*, that, having regard to s. 54 of the Transfer of Property Act and s. 27 (*b*) of the Specific Relief Act, in a suit for the specific performance of contract brought by *J*, neither the *bainanamah* nor the deed of conveyance in favour of *R* and *H* could prevail against the prior unregistered contract of *J*. *Held*, further, that the unregistered document of the 27th December 1895, came under s. 17, cl. (*h*) of Act III of 1877, and was not inadmissible in evidence for want of registration; and that the registered *bainanamah* of the 3rd January 1896 did not take effect against it, under s. 50 of that Act. HURNANDUN SINGH v. JAWAD ALI, 27 C. 468 ... 308

(3) S. 39—See GRANT, 27 C. 156.

(4) Ss. 42, 45—See ACT III OF 1884 (BENGAL MUNICIPAL), 27 C. 849.

Stamp Act (I of 1879).

(1) S. 3, sub-s. 18, s. 61, sch. I, art. 29, cl. (*b*) and art. 44—See MORTGAGE, (GENERAL), 27 C. 587.

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(2) *Ss.* 58, 61 *and* 64—"*Signing otherwise than as a witness, etc.," meaning of—Liability of agent authorised to sign on behalf of principal—Granting of unstamped receipt—Refusal to grant stamped receipt by firm—Liability of members of such firm—" Person," meaning of—Proof of demand of receipt.*—The expression "signing otherwise than as a witness, etc.", as used in s. 61 of the Stamp Act means the writing of a person's name by himself or by his authority, with the intent of authenticating a document as being that of the person whose name is so written. An ordinary agent authorized to sign on behalf of his principal would fall within this description, and consequently within the purview of the section. Where, therefore, a person signed a firm's name to certain letters under the authority of the firm, the circumstance that the body of the letters were written at the dictation of the manager of the firm was held not to be sufficient to distinguish his case from that of any other agent. The term " person " in ss. 61 and 64 of Stamp Act includes the members of a trading partnership. So, where certain persons, members of a firm carrying on business in Calcutta as general dealers (which firm had acknowledged the receipt of certain sums of money from one *L* and had refused to grant him a stamped receipt), were charged under s. 61 of the Stamp Act with having granted an unstamped receipt, and under s. 64 of that Act with having refused to grant a duly stamped receipt, it was held that their liability depended on whether they were in contemplation of law the persons who signed the letters of acknowledgment or refusal to give the receipt, and not on whether they were present at the writing of the letters, or knew of the writing of them, provided that it was established by evidence that a requisition for a receipt had been made under s. 58 of that Act. QUEEN-EMPRESS v. KHETTER MOHUN CHOWDHRY, 27 C. 324 = 4 C.W.N. 440 ... 213

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(1) Of person under arrest, impropriety of recording– See EVIDENCE, 27 C. 295.

(2) See DEFAMATION, 27 C. 262.

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(1) S. 7—See CIV. PRO. CODE (ACT XIV OF 1882), 27 C. 217.

(2) S. 49—See INSOLVENCY, 27 C. 351.

Stay.

Of proceedings in India pending appeal—See PRIVY COUNCIL, 27 C. 1.

Step-in-aid of Execution.

(1) See LIMITATION, 27 C. 285.

(2) See LIMITATION ACT (XV OF 1877), 27 C. 210, 709.

Subordinate Courts.

Authority of—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 27 C. 1023.

Succession Act (X of 1865).

(1) S. 50—See HINDU LAW (WILL), 27 C. 169.

(2) S. 263—See APPEAL (GENERAL), 27 C. 5.

Sufficient Cause.

See PRACTICE, 27 C. 57, 60 (N).

Summary Jurisdiction.

See PRACTICE, 27 C. 269.

Summary Trial.

Dispute as to possession of land—Bona fide *belief as to title—Cutting and carrying away crops sown by another– Facts constituting theft—Dishonest intention—Penal Code (Act* XLV *of* 1860), *ss.* 24 *and* 379—*Code of Criminal Procedure (Act* V *of* 1898), *ss.* 429 *and* 439.—An accused person alleged and claimed that certain paddy was grown upon his *jote*, and that he cut and removed it as a matter of right and in an assertion of a *bona fide* claim to the land. It was admitted by the complainant who also claimed the paddy and the land, that there had been a boundary dispute between his landlord and the landlord of the accused. The accused was convicted in a summary trial of the theft of the paddy. *Held*

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per Prinsep, J., that, if the complainant's *bargadars* had grown the crops as found and nevertheless the accused cut and carried them off there could be no *bona fide* belief that he was entitled to do so to justify his action in regard to the complainant. With the fact found that possession was with the complainant by the growing by him of the crops cut by the accused, the accused was without justification in thus taking the law into his hands, even if he was entitled to hold the lands, because he was not in actual possession of them. The Court would refuse to interfere.. *Per Stevens, J.*, The findings of the lower Court taken as a whole amounted to a finding that the accused acted *mala fides* and the mere fact that he brought some witnesses to speak to his long possession of the land, and the cultivation of the crops by him could not be taken as showing that a *bona fide* dispute as to title existed between the complainant and himself. To constitute theft it is sufficient if property is removed against his wish, from the custody of a person who has an apparent title or even a colour of right to such property. In the present case the complainant had an apparent title as tenant of the land, together with long possession, and he had on the strength of that apparent title and long possession raised the crops which the accused removed. The application should be dismissed. *Per* STANLEY, J., *contra.*—That the evidence as well for the prosecution as for the defence conclusively established that there was a *bona fide* dispute as to the title to the land upon which the paddy was sown. Once this was shown the criminal charge failed. The fact, if it be the fact, that the padddy was sown by the complainant, would not give him the property in the crop, if it were sown on the land of the accused. If the land was the land of the accused it was an act of trespass on the part of the complainant to sow it with paddy, and the complainant had no right to complain if the accused resented his act of aggression by cutting and removing the crop. A dishonest intent is a necessary ingredient in the offence of theft. No such intention has been found on the part of the accused. The conviction and sentence should therefore be set aside. PANDITA *alias* RAHMATULLA PRAMANIK v. RAHIMULLA AKUNDO, 27 C. 501=4 C.W.N. 480 ... 329

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(1) Non-attendance after service of—See CONTEMPT, 27 C. 985.

(2) Sale set aside for non-service of—See RIGHT OF SUIT, 27 C. 197.

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Of High Court—See APPEAL (GENERAL), 27 C. 5.

Survivorship.

See HINDU LAW (JOINT FAMILY), 27 C. 515.

Tenancy.

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(1) Association for purpose of habitually committing—See EVIDENCE, 27 C. 139.

(2) See SUMMARY TRIAL, 27 C. 501.

(3) See CHARGE, 27 C. 660, 990.

Time.

(1) Application for—See LIMITATION, 27 C. 285.

(2) Application for enlargement of, to file paper books—See PRACTICE, 27 C. 57; 27 C. 60 N.

(3) Extension of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 705.

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(1) Acknowledgment of—See LIMITATION ACT (XIV OF 1859), 27 C. 1004.

(2) And possession—See LIMITATION, 27 C. 25.

(3) *Evidence and proof of title—Possession—Alleged title by adverse possession for more than the period of limitation.*—Land bordered by the estates of each of the parties contesting its ownership was registered in the Collectorate as a separate mauza, as it also was represented to be in a Revenue survey map of 1856. In a subsequent survey map of 1865 it appeared as being within the limits of the defendants' adjoining talukh. Neither from these maps nor any other documents was there evidence of title in either party, so that possession was all that could be resorted to as the ultimate test of right. The plaintiff relied on limitation. She asserted more than twelve years' adverse possession by having settled tenants on the disputed ground. To entitle her, it was necessary for her, the burden of proof being upon her, to prove that she had held a possession adequate in continuity, in publicity, and in extent of area. Upon all these points her case was deficient, and therefore her claim failed. It was also in evidence, which was the more substantial, that the defendant had occupied during that period a part of the land by tenants; and this, as proof of possession on his part, applied not only to the plots actually tenanted under him, but was contradictory to the whole theory of the plaintiffs' claim. RADHAMONI DEBI v. COLLECTOR OF KHULNA, 27 C. 943 (**P.C.**) =27 I.A. 136=4 C.W.N. 597=2 Bom. L R. 592=7 Sar. P.C.J. 714 ... 617

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(6) See HINDU LAW (JOINT FAMILY), 27 C. 515.

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(1) Right of ferryman to demand—See ACT III OF 1884 (BENGAL MUNICIPAL), 37 C. 817.

(2) See RENT, 27 C. 239.

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Trade-mark.

User of and property in, Proof of—Importation and sale of articles with particular marks impressed upon them—Succession by one Bank to business of another—Merchandise Marks Act (IV *of* 1889), s. 3—*Penal Code* (*Act* XLV *of* 1860), *ss.* 485 *and* 486.—A mark to be a trade-mark must be a mark used for denoting that the goods are the manufacture or the merchandise of a particular person. The mere fact that a bank imported and sold gold bars with a particular mark impressed upon them, a mark which was not originally theirs but belonged to a bank that had ceased to exist, and where there was no proof of any transfer or assignment of the mark, or that the new bank succeeded the other in the sense either that it was a continuation of that bank under another name, or that it succeeded to the business or acquired the good-will of that bank, was held not to be sufficient to establish that the mark was the trade-mark of the new bank. ANOOKOOL CHUNDER NUNDY v. QUEEN-EMPRESS, 27 C. 776=4 C.W.N. 423 ... 508

Transferee.

For consideration and without notice—See TRANSFER OF PROPERTY ACT (IV OF 1882), 27 C. 194.

Transfer of Property Act (IV of 1882).

(1) S. 39—*Transferee for consideration and with notice--Mortgagee—Decree declaring charge on immoveable property for maintenance—Notice of charge—Constructive notice—Vendor and purchaser.*—Section 39 of the Transfer of Property Act does not protect a transferee for consideration, when the immoveable property transferred has already been declared by a decree of Court subject to a charge in favour of a Hindu widow for her maintenance. The fact that the maintenance claimed accrued due subsequent to the transfer does not affect the liability of the property transferred to be sold in execution of a decree for the maintenance so claimed. KULODA PROSAD CHATTERJEE v. JAGESHAR KOER, 27 C. 194 ... 128

(2) S. 51—See LNDLORD AND TENANT, 27 C. 570.

(3) S. 52—See HINDU LAW (MAINTENANCE), 27 C. 77.

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(4) S. 54—See SPECIFIC RELIEF ACT (I OF 1877), 27 C. 468.

(5) *S. 54—Vendor and purchaser—Deed of sale—Completion of sale—Registration—Non payment of consideration—Delivery of deed of sale.*—Mere registration of a deed of sale, unaccompanied by delivery of the deed to the vendee, does not make the transaction a completed one. Although under the Transfer of Property Act the sale of a tangible immoveable property of the value of one-hundred rupees and upwards can be made only by a registered instrument, yet mere registration should not be taken as conclusive that the title has passed. If it was intended by the parties that the title should pass only upon the consideration money being paid, such intention should be given effect to. MAULADAN v. RUGHUNANDAN PERSHAD SINGH, 27 C. 7 ... 5

(6) *S. 59—Attestation of mortgage bond—Meaning of the word "attested"—Evidence Act* (I *of* 1872), *ss.* 68, 69, 70, 71—*Admission of execution.*—The *attestation* required by s. 59 of the Transfer of Property Act is an attestation by witnesses of the *execution* of the document, and not of the *admission* of execution. The word "admission" in s. 70 of the Evidence Act relates only to the admission of a party *in the course of the trial of a suit*, and not to the attestation of a document by the admission of the party executing it. ABDUL KARIM v. SALIMUN, 27 C. 190 ... 125

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(9) *Ss.* 86 *and* 87—*Order for possession absolute—Order for foreclosure absolute—Mortgagor's right to apply for extension of time, before an order for foreclosure absolute—Redemption of mortgage before order absolute.*—Until an order for foreclosure absolute in proper form is made under s. 87 of the Transfer of Property Act, the mortgagor can, upon a proper application, redeem the mortgaged property. SOMESH v. RAM KRISANA CHOWDHRY, 27 C. 705=4 C.W.N. 699 ... 463

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